PRACTICING THE LAW OF HUMAN DIGNITY:
A STORY OF 'SOMETHING MISSING'

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ABSTRACT

PRACTICING THE LAW OF HUMAN DIGNITY: A STORY OF 'SOMETHING MISSING'

By Matthildi Chatzipanagiotou

The philosophical underpinnings of what may be called the meta-dimension of the law of human dignity trigger a question that surpasses the boundaries of the discipline of law: how could the transcendental as an aspect of human dignity meaning be portrayed? The insistence on non-determination of the *Menschenbild* [human image] or 'God' in the Preamble to the German Basic Law [*Grundgesetz*] reflected in German legal doctrine, paired with the commitment to case-by-case *ad hoc* concretization of what human dignity means inspire this story of 'something missing'. In postmodern fashion, this story portrays the law of human dignity as a Trojan Horse and provides hermeneutic and literary foundations for an affirmative stance towards 'emptiness' talk in legal discourse. The research question rekindles and twists polemically framed 'emptiness' and 'black box' contentions: Why does the legal concept of human dignity appear 'empty'? Or, how is it 'empty'? Why and how is it a 'black box'? How do manifestations of the concept appear abstract as universals and concrete as particulars? The ontological, linguistic-analytical, and phenomenological philosophical insights presented in Chapter One compose the lens through which five benchmark *Bundesverfassungsgericht* cases – on abortion, life imprisonment, transsexuals, state response to terrorist attacks, and the guarantee of a dignified subsistence minimum – are analyzed in Chapter Two. The philosophical sources are not bracketed as moments in the long course of human dignity in the history of ideas.

Keywords:
Human dignity, fundamental rights, *Leerformel* [empty formula], empty box, redundancy theories, non-determination, 'something missing', metaphysical, God, ontological, Presocratic Heraclitus, Catherine MacKinnon, Jacques Rancière, linguistic-analytical, Ludwig Wittgenstein, field of sight, language game, limit, phenomenological, Emmanuel Levinas, self, other, hospitality, *Bundesverfassungsgericht* [Federal Constitutional Court], abortion, life imprisonment, transsexuals, *Luftsicherheitsgesetz* [Aviation Security Act], dignified subsistence minimum, law and literature, hermeneutics, transdisciplinarity

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Die philosophischen Grundlagen der Meta-Dimension des Rechts auf Menschenwürde lösen eine Fragestellung aus, die die Grenzen der Disziplin des Rechts übertrifft: wie könnte das Transzendentale als ein Aspekt der Bedeutung von Menschenwürde dargestellt werden? Das Beharren auf der nicht-Bestimmung des Menschenbildes oder auf dem Begriff ‚Gott' in der Präambel des Deutschen Grundgesetzes, wie es sich in der Deutschen Dogmatik widerspiegelt, gepaart mit dem Bestreben nach einer Fall-zu-Fall *ad hoc* Konkretisierung dessen, was

Menschenwürde bedeutet, inspiriert diese Untersuchung von ‚etwas fehlt' ['something missing']. In postmoderner Art und Weise beschreibt diese Geschichte das Gesetz der Menschenwürde als Trojanisches Pferd und bietet hermeneutische und literarische Grundlagen für eine affirmative Haltung gegenüber einer 'leeren' Rede im juristischen Diskurs. Die Forschungsfrage erweckt und umkreist die polemisch verbrämten Begriffe von ‚Leere' und ‚Black Box': Warum erscheint der Rechtsbegriff der Menschenwürde ‚leer'? Oder wie ist er ‚leer'? Warum und wie ist er eine ‚Black Box'? Wie erscheinen Manifestationen des Konzepts abstrakt wie Universalien, aber im Einzelnen konkret? Die ontologischen, sprachlich-analytischen und phänomenologischen philosophischen Erkenntnisse, vorgestellt im ersten Kapitel, bilden die Linse, durch die fünf maßgebliche Fälle des Bundesverfassungsgerichtes – über Abtreibung, lebenslange Freiheitsstrafe, Transsexualität, staatliche Reaktion auf Terroranschläge und die Gewährleistung eines menschenwürdigen Existenzminimums – im zweiten Kapitel analysiert werden. Die philosophischen Quellen werden nicht als Momente im langen Verlauf der Menschenwürde in der Geschichte der Ideen eingeklammert.

Stichwörter:
Menschenwürde, Grundrechte, Leerformel, Redundanz Theorien, nicht-Bestimmung, ‚etwas fehlt", metaphysisch, Gott, ontologisch, vorsokratisch, Heraklit, Catherine MacKinnon, Jacques Rancière, sprachlich-analytisch, Ludwig Wittgenstein, Gesichtsfeld, Sprachspiel, Begrenzung, phänomenologisch, Emmanuel Levinas, selbst, andere, Gastfreundschaft, Bundesverfassungsgericht, Abtreibung, lebenslange Freiheitsstrafe, Transsexualität, Luftsicherheitsgesetz, menschenwürdiges Existenzminimum, Recht und Literatur, Hermeneutik, Transdisziplinarität

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Athens College, my high-school, and my professors and teachers there spurred the quest for the meaning of human dignity. In 2003, my senior year in highschool, my speech titled 'Which path allows us to conquer dignity?' won the first prize in the time-honored senior year Delta Rhetorical Competition.

Originally, as a high-school student, I had set my sights on studying Literature, but, instead, I decided to study law. This thesis evolved into a literary approach to law in spite of myself. I owe the confidence, freedom and love cultivated for both disciplines to my professors at Athens Law School. They nurtured in me the value of persistence, opened my eyes to a new Greek language, the language of law, and to legal thought, and I am not able to thank enough Prof. Dr. Nikos Alivizatos, Prof. Dr. Theodora Antoniou, Prof. Dr. Georgios Gerapetritis, Prof. Dr. Panos Lazaratos, Prof. Dr. Michalis Marinos, and Prof. Marina Maropoulou for all they have contributed to my humble success in this effort.

Later, as part of my LL.M. program at the New York University School of Law I attended a seminar on European human rights with Prof. Dr. Mattias Kumm and conducted research, for the first time, on the presence of human dignity as language in the jurisprudence of the European Court of Human Rights. The ensuing paper was a stepping stone for my doctoral thesis proposal. This year in New York proved to be a blessing: I experienced how friendship and celebration of diversity are the beautiful and most important outcomes of international education. I am grateful to the Fulbright Foundation, the Alexander S. Onassis Foundation and the Mitsotakis Foundation for supporting my graduate studies in New York; I realize the responsibility I have assumed to contribute to their legacy and heritage of scholarship. I am also particularly grateful to Professor Joseph H. H. Weiler, Ph.D. for inspiring me to remain in academia, pursue teaching, and for his crucial intervention in the reflection process that resulted in framing my doctoral research proposal as a law and culture enterprise.

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INTRODUCTION

The purpose of this introduction is to delineate the research objective, locate the analysis in state-of-the-art research on the law of human dignity, and present premises to questions triggering this study, the central thesis underlying a story of 'something missing', the methodology applied, and the spine of this argument.

A. Delineation of the research objective and location of the analysis in the state of the art

Spurred by the philosophical underpinnings of what may be called the transcendental dimension of the law of human dignity, meaning the insight that the legal concept operates also at a meta-level, I pose a question that surpasses the boundaries of the discipline of law. The question raised is triggered first by the insistence on non-determination of the *Menschenbild* [human image] or 'God' as in the Preamble to the German Basic Law in German legal doctrine. Commitment to non-determination is paired with the requirement of case-by-case *ad hoc* concretization. This then leads to the question of whether and how the meta-dimension of the law of human dignity can be portrayed apropos the mutually complementary stances of non-determination and *ad hoc* concretization to enhance our understanding of how this law is practiced. To answer this question, I delve into the respective areas of discussion in German legal doctrine. In addition I turn to continental-European and Anglo-American literature, not only as indispensible sides of a trans-Atlantic dialogue-in-progress, but also because resorting to both permits a – slighter or greater – constant shift of perspective that reinforces critical reflection.

Indeed, the plunge into the above issues resonates an 'oceanic feeling'[1] in that the abundance of perspectives found in the literature sparks infinite cohesive

[1] In *Civilization and its Discontents,* the father of psychoanalysis Sigmund Freud notes, '[…] [I]n making any general judgment […] we are in danger of forgetting how variegated the human world and its mental life are. […] [There] is a feeling which he [an anonymous friend of Freud, later revealed to be French Nobel Prize winner Romain Rolland, a dramatist, novelist, art historian and mystic] would like to call a sensation of "eternity", a feeling of something limitless, unbounded – as it were, "oceanic". This feeling, he adds, is a purely subjective fact, not an article of faith; it brings with it no assurance of personal immortality, but it is the source of the religious energy which is seized upon by the various Churches and religious systems, directed by them into particular channels, and doubtless also exhausted by them. One may, he thinks, rightly call oneself religious on the ground of this oceanic feeling alone, even if one rejects every belief and every illusion. The views expressed by the friend […] caused me no small difficulty. I cannot discover this "oceanic" feeling in myself. It is not easy to deal scientifically with feelings. […] If I have understood my friend rightly, he means the same thing

inceptions of human dignity conceptualizations, that is, could stimulate a profusion of hermeneutic projects. This also renders any clearly delineated, systematic approach an essentially reductive account of the subject matter, and necessitates even more the careful location of my analysis apropos state-of-the-art research. Mapping aspects of the controversy around how to understand and mobilize human dignity in law allows us to perceive why this task presents a particular challenge.

My study is a drop in this ocean of contemplation and discourse. For that, I first present broad waves, with the purpose of illustrating how this drop contributes to state-of-the-art research. The focal point being the constitutional guarantee of human dignity in Germany, that is, a persevering quest for determination of meaning, I am aware that I delve into a subject matter that has been pondered by many thinkers within the discipline of law. However, it is my intention to locate my study amidst this body of reflections, which is why I will first refer to approaches to the normative status and function of human dignity in the constitutional order of the Basic Law, to then proceed with highlighting areas in the legal discourse of pertinence to the delineation of my inquiry.

The controversy around how the law of human dignity is to be practiced mirrored in German and Anglo-American legal scholarship and equally ensuing from an overview of human dignity manifestations in constitutional courts' jurisprudence[2] significantly feeds on the abundance of perspectives on the meaning of human dignity. The discourse on issues concerning the practice of the legal concept has not faded since the dawn of the United Nations that marked the emergence of a new multilevel constitutionalism reality. In seeking to portray how the transcendental character of the law of human dignity is mobilized in text as an aspect of judicial practice, this study takes Art. 1 sec. 1 GG as a case in point. Art. 1 sec. 1 GG reads:

> Human dignity shall be inviolable [*ist unantastbar*]. To respect and protect it shall be the duty of all state authority.

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by it as the consolation offered by an original and somewhat eccentric dramatist to his hero who is facing a self-inflicted death. "We cannot fall out of this world." [Christian Dietrich Grabbe, 1801-1836], *Hannibal:* "Ja, aus der Welt werden wir nicht fallen. Wir sind einmal darin."] That is to say, it is a feeling of an indissoluble bond, of being one with the external world as a whole.' Sigmund Freud, *Civilization and its Discontents* (Standard Edition with a Biographical Introduction by Peter Gay, first published in German in 1930, New York, London: W. W. Norton & Company, Inc., 1989) 10-12

[2] The constitutional courts implied are those prevalent in German and Anglo-American legal scholarship on the practice of the law of human dignity, for instance the Canadian, the Israeli, the South African, the Indian, the Hungarian constitutional courts.

The dignity of the human being is seen as the highest value [*das oberste Gut, Höchstwert*] of the German constitutional order[3], and the cornerstone of the Basic Law's value order [*Wertordnung*]. This is confirmed by the constitution's eternity clause in Art. 79 sec. 3 GG.[4] The state's commitment to respect for and protection of the dignity of human beings under Art. 1 sec. 1 GG develops third party effects [*Drittwirkung*] directly deduced from the constitutional clause. Recognition of the high rank of the legal concept exceeds, of course, German borders and crosscuts levels of constitutionalism.[5] Parallels can be drawn[6] between the formulation of the human dignity guarantee in Art. 1 sec. 1 GG and other constitutional texts, European Union law and international law treaties[7]. Human dignity language in the text of the Basic Law declares the state's self-understanding[8]. Similarly, other constitutional, EU law and international law human dignity clauses reflect the distinct self-understanding of the respective entities, while establishing a sense in which diverse and unique self-understandings stand side by side[9].

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[3] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 4; Kunig, Art. 1, *GG Kommentar* (2012) para 1

[4] Herdegen, ibid

[5] See Udo Di Fabio, 'Die Grundrechte als Wertordnung' (2004) *JZ* 1, 5 [highest value of global law]; Reiner J. Schweizer & Franziska Sprecher, 'Menschenwürde im Völkerrecht' in Jurt Seelman (ed), *Menschenwürde als Rechtsbegriff*, (1st edn, Stuttgart: Franz Steiner Verlag, 2005) 127, 127ff.; Peter Häberle, *Europäische Verfassungslehre* (7th edn, Baden-Baden: Nomos, 2011) 286 [human dignity belongs to the cultural anthropological premises of Europe]

[6] Kunig (n 3) para 2

[7] See *infra*, Chapter Two, Part A

[8] Kunig (n 3) para 3

[9] The reality of 'multilevel constitutionalism' corresponds to a complex experience of personal pluralism, indeed formative of the self-understanding of human beings, namely the experience of being the bearer of human dignity and fundamental rights across levels of constitutionalism. Ingolf Pernice, 'Multilevel Constitutionalism in the European Union' (2002) 5 *Walter Hallstein-Institut für Europäisches Verfassungsrecht* 1, 2 ['"Multilevel constitutionalism" is meant to describe and understand the ongoing process of establishing new structures of government complementary to and building upon – while also changing – existing forms of self-organisation of the people or society. It is a theoretical approach to explaining how the European Union can be conceptualised as a matter and creature of its citizens as much as the Member States are a matter and creature of their respective citizens. The same citizens are the source of legitimacy for public authority at the European level as well as – regarding their respective Member State – at the national level, and they are subject to the authority exercised at both levels.']; See ibid, 'Fundamental Rights and Multilevel Constitutionalism in Europe' (2004) 7 *Walter Walter Hallstein-Institut für Europäisches Verfassungsrecht*; See also, Maya Hertig 'The Prospects of 21st Century Constitutionalism' (2003) 7(1) *Max Planck Yearbook of United Nations Law* 26 [relations and functions between layers of governance]; Dieter Grimm, 'Stufen der Rechtsstaatlichkeit. Zur Exportfähigkeit einer westlichen Errungenschaft' (2009) 64(12) *JZ* 596 [the rule of law is not a closed concept; rather, it is layered and its adoption and realization is contingent on inter-state cooperation and the activity developed by international organizations on matters such as international financial support to states]; Anna Peters, 'The Merits of Global Constitutionalism' (2009) 16(2) *Indiana Journal of Global Legal Studies* 397; Fritz Scharpf, 'Legitimacy in the multilevel European polity' (2009) 1(2) *European Political Science Review* 173 [stressing need for the initiation of 'communicative discourses' in the national public space in view of the multilevel reality and drawing the 'liberal'-'republican' distinction]; Andreas Voßkuhle, 'Multilevel cooperation of the

Negative, violation-based determinations of human dignity meaning are premised on an understanding of respect as abstention from interference and can be associated with the Basic Law's reaction to the National-Socialist past of the German state. Positive determinations correspond to the objective duty of the state to guarantee human dignity and can be associated with the interpretation of dignity apropos the notion of duty in the history of ideas, for instance in Cicero or Thomas Aquinas and, more generally, Christian doctrine.[10] Illustrative attempts to theorize positive determinations are the *Leistungstheorie* [performance or achievement theory], the *Mitgifttheorie* [endowment theory], and the *Kommunikationstheorie* [communication theory][11]. Other approaches to the determination of the law of human dignity are negative violation-based definitions[12] and the famous thesis of non-interpretation.[13] Can the law of human dignity serve as the basis of claims addressing questions of our time, such as issues in biomedicine and bioethics?[14]

In German constitutional law, human dignity is a legal norm, despite the high degree of conceptual indeterminacy. The normative quality of the concept does not depend on parameters such as density of substantive content, need for interpretation,

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European Constitutional Courts: The Europäische Verfassungsgerichtsverbund' (2010) 6(2) *European Constitutional Law Review* (2010) 175 [the hierarchy of courts in this multilevel order is not simplistic, and it advances dialogue in human rights; Voßkuhle focuses on the cooperation between the FCC, the ECtHR and the ECJ]; Neil Walker, 'Multilevel Constitutionalism: Looking Beyond the German Debate' (2010) *LSE 'Europe in Question' Discussion Paper Series* [distinguishing between multilevel constitutionalism *senso stricto*, as per Pernice, and *senso lato*]

[10] For an overview of the concept's course in the history of ideas, see Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) paras 7-13

[11] Hasso Hofmann, 'Die versprochene Menschenwürde', in ibid (ed), *Verfassungsrechtliche Perspektiven: Aufsätze aus den Jahren 1980-1994* (first published: (1993) 118 *AöR* 353; Tübingen: Mohr, 1995) 104, 104ff.; ibid 111 [human dignity as social recognition]

[12] BVerfGE 1, 97 (104) (1951) [*Hinterbliebenenrente I*]; BVerfGE 27, 1 (6) (1969) [*Mikrozensus*]; BVerfGE 30, 1 (25) 72, 105 (115ff.) (1970) [*Abhörurteil*]; Wolfgang Vitzthum, 'Die Menschenwürde als Verfassungsbegriff' (1985) *JZ* 201, 202f. [flexibility as an advantage of negative violation-based interpretations of the law of human dignity]

[13] The '*nicht-interpretierte These*' by Theodor Heuß. See Paul Tiedemann, *Menschenwuerde als Rechtsbegriff. Eine philosophische Klärung* (Schriftenreihe des Menschenrechtszentrums der Universitaet Potsdam, Bd. 29, 2nd edn, Potsdam: BVW – Berliner Wissenschafts-Verlag, 2010) 68ff.; ibid 70 [critique on the *nicht-interpretierte These* of Theodor Heuß and comparative insights]; ibid 71 ['Als in diesem Sinne "nicht interpretierte These" hat die Würdeklausel keinerlei Inhalt. Ohne Inhalt kann ihr aber auch keine rechtliche Bedeutung zukommen. Die Menschenwürdeklausel des Grundgesetzes darf deshalb nicht als ein 'letzlich nicht Fassbares,' sondern sie muss als ein Formelkompromiss verstanden werden.']

[14] Dreier, for instance, responds in the affirmative, underscoring, however, that human dignity should not be viewed as the solution to any and all questions arising in law. While it can be applied in treating various issues, ranging from physical contingency and personal identity to psychological integrity, it cannot function as a solution to all conceivable fundamental rights cases, or else practice would be inflated and trivialized and openness to particularistic ethics could precipitate manipulative practice. Horst Dreier, Art. 1 Abs. 1, in Horst Dreier (ed), *Grundgesetz. Kommentar* (seit 1996, Bd. 1, A. 1-19, 2nd edn, Tübingen: Mohr Siebeck, 2004) para 41; See also Ernst-Wolfgang Böckenförde, 'Menschenwürde als normatives Prinzip – Die Grundrechte in der bioethischen Debatte' (2003) *JZ* 809

or ambiguity of meaning, but rather on the structure of the norm, namely on whether it is only an appeal or aspiration, or, equally, an enforceable proposition.[15] The practical relevance of Art. 1 sec. 1 GG to lived experience is contingent on the normative structure of the law of human dignity. Another parameter of relevance to lived experience is the relation between the law of human dignity and other fundamental rights. In line with correspondence theories, the guarantee of human dignity is a fundamental proposition operating in correspondence with other fundamental rights; thus, the legal protection of human dignity presents no deficit, as the abstraction that would detract from the enforceability of that law and its relevance to the realm of life is remedied through such correspondence.[16] As famously framed by Hannah Arendt, the right to human dignity is 'the right to have rights'[17]. The *Ausstrahlungseffekt* [radiation effect] of human dignity, indeed a prominent claim in German legal doctrine, indicates how the law of human dignity permeates all other fundamental rights and law in its entirety.

One of the fundamental questions raised in legal discourse is whether the law of human dignity should be interpreted as an objective legal proposition or, also, as a subjective right.[18] The grammatical and systemic interpretation of the legal concept, the constitutional history [*Entstehungsgeschichte*] of Art. 1 sec. 1 GG and Federal Constitutional Court [FCC, *Bundesverfassungsgericht*] jurisprudence are at variance with respect to whether the legal concept of human dignity only has the normative structure of a fundamental principle, value and proposition of rhetorical[19] and programmatic nature, rather than, also, of a fundamental right.[20] Why are such distinctions of significance? The normative structure of human dignity defines how that law is to be practiced and concretized[21] and how meaning is to be produced. For instance, a principle grants legal actors considerable latitude in determining the

[15] Kunig, Art. 1, *GG Kommentar* (2012) para 18
[16] Tim Wihl, 'Wahre Würde – Ansätze zu einer Metatheorie der Menschenwürdetheorien' in Carsten Bäcker & Sascha Ziemann (eds), *Junge Rechtsphilosophie* (Stuttgart: Steiner Verlag, 2012) 187, 194f.
[17] Hannah Arendt, *The Origins of Totalitarianism* (London: André Deutsch, 1986)
[18] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 6
[19] Rhetoric as an aspect of law's practice is contingent, among other things, on legal and professional culture. See also Binder, Guyora & Robert Weisberg, *Literary Criticism of Law* (Princeton, New Jersey: Princeton University Press, 2000) 366
[20] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 124 fn 417-18
[21] Werner Krawietz, 'Gewährt Art. 1 Abs. 1 GG dem Menschen ein Grundrecht auf Achtung und Schutz seiner Würde?' (1977) *GS. F. Klein* 245, 261; See also Kunig (n 15)

content of the guarantee – usually practiced in conjunction with another value[22] – and concretizing the law of human dignity *ad hoc*, in other words producing meaning.

Another decisive parameter of meaning is the constellation of fundamental rights and the position of the law of human dignity apropos other legal norms. The position of human dignity in a system and the architecture of the system as such affect the production of meaning and, consequently, the portrayals of practice. Conceiving of the relation between the three fundamental rights, dignity, liberty and equality, as a triangular system[23], rather than a pyramid with human dignity at the apex requires the inclusion of the interplay between the three corners in portrayals of the practice of the law of human dignity.

Scholars identify different functions of the law of human dignity. The standard-setting function is paired with the inventive or creative[24] function, which at once originates in and fosters the openness of the concept to new meaning, hence to evolution. The concept presents a high degree of adaptability to the multifarious instantiations of the human condition. To the extent that the law of human dignity prescribes rather than simply marks openness, it can be relationally portrayed in light of James Boyd White's point on commitment to 'many-voicedness […] against the single voice, the single aspect of the self or culture dominating the rest.'[25] The principle of human dignity serves a scandalizing and irritative function in a pluralistic world.[26]

Turning our sights to the practice of the law of human dignity, there are certain identifiable formative factors of the meaning produced, which should not escape our attention. The pre-understanding [*Vorverständnis*][27] of legal actors, legal

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[22] The recurrent phenomenon, especially in FCC jurisprudence, of practicing the law of human dignity in conjunction with the general right to personality or the right to life, intimates how the cumulative effect of pairing that law with other legal concepts is formative of human dignity meaning.

[23] Susanne Baer, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism,' (2009) 59 *University of Toronto Law Journal* 417

[24] Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights', (2010) 41(4) *Metaphilosophy* 464, 467f.; See also Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19(4) *EJIL* 655, 721f.

[25] James Boyd White, *Heracle's Bow: Essays on the Rhetoric and Poetics of the Law* (Madison: Univ. of Wisconsin Press, 1985) 124

[26] Susanne Baer, 'Menschenwürde zwischen Recht, Prinzip und Referenz – Die Bedeutung von Enttabuisierungen' (2005) 4 *DZPhil* 571, 588

[27] See Josef Esser, *Vorverständnis und Methodenwahl in der Rechtsfindung: Rationalitätsgrundlagen richterlicher Entscheidungspraxis* (Frankfurt am Main: Athenäum Fischer Taschenbuch Verlag, 1972); Hans Georg Gadamer, *Truth and Method* (first published: 1975, London, New York: Continuum Publishing Group, 2004) 294 ['Hence the most basic of all hermeneutic preconditions remains one's own fore-understanding, which comes from being concerned with the same subject.']

doctrine, theoretical accounts[28], methods employed in practicing that law[29], and the history of the idea [*Geistesgeschichte*] are all parameters influencing the meaning that ensues from the mobilization of human dignity language in law. The critical tension, and challenge for legal actors, consists of the reconciliation of the abstract and universal – or, better, abstract as universal – character of human dignity with the multifarious concrete particulars that arise in law's practice.

As regards universals[30], some scholars examine the prospect of consensus on a universal minimum core of human dignity meaning[31] and discuss how broad or narrow, minimal or inclusive[32] this core should be. Others opt for a methodical approach to establishing the universal validity of a theory of human dignity. Tiedemann postulates the validity of argumentation as a method enjoying universal comprehensibility[33]; notes how grounding universal validity on argumentation brings about the necessary distancing or alienation from oneself [*Selbstdistanzierung*] for elevating an opinion into a thesis[34]; and identifies the range of arguments composing the arsenal of the methodical approach: formal-logical[35], transcendental[36], conceptual

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[28] Binder & Weisberg, *Literary Criticism of Law* (2000) 170 ['Dworkin characterized law as a practice of arguing that conduct is required or permittedy by authoritative sources. Since disagreement about what counts as a source of law is a recurrent experience in legal practice, he reasoned, different theories of what law is are themselves sources of law.']; See also Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986) 74 ['Our controversies about justice are too rich, and too many different kinds of theories are now in the field.']; Catherine A. MacKinnon, *Are Women Human? And Other International Dialogues* (2006) 34 ['New theories help make new realities. […] Theory appropriates reality in a certain way – its way is method – to make the world accessible to understanding and change. It is a way of getting a grip on things.']; ibid 35 [MacKinnon's account of theory is synopsized as making 'theory out of practice […] to build a piece of theory of the kind we need rather than to talk about how theory is or should be done.']

[29] Dieter Grimm, 'Methode als Machtfaktor' in Helmut Coing *et al* (eds), *Europäisches Rechtsdenken in Geschichte und Gegenwart: Festschrift für Helmut Coing zum 70. Gebusrtstag* (Bd. 1, München: Beck, 1982) 469; See also Esser (n 27)

[30] See MacKinnon, *Are Women Human?* (2006) 53 ['[…] the idea that there is nothing essential, in the sense that there are no human universals, is dogma. Ask most anyone who is going to be shot at dawn.']

[31] The pictorial rendering of human dignity meaning is endearing to legal doctrine and scholarship in general. Figurative approaches have great suggestive force, could be reflecting complex psychological and social findings, and draw attention to fundamental rights doctrine. See Ralf Poscher, 'Menschenwürde und Kernbereichsschutz – Von den Gefahren einer Verräumlichung des Grundrechtsdenkens' (2009) *JZ* 269, 276

[32] See Eric Hilgendorf, 'Instrumentalisierungsverbot und Ensembletheorie der Menschenwürde' in Hans-Ulrich Paeffgen, Martin Böse, Urs Kindhäuser, Stephan Stübinger, Torsten Verrel & Rainder Zaczyk (eds), *Strafrechtswissenschaft als Analyse und Konstruktion – Festschrift für Ingeborg Puppe zum 70. Geburtstag* (Berlin: Duncker & Humblot, 2010) 1653

[33] Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 177

[34] ibid 180

[35] ibid 185

[36] ibid 187 ff.; ibid 187 f. [On account of linguistic-analytical insights – specifically, the thought of Ludwig Wittgenstein – in Chapter One allowing the spatial rendering of the transcendental character of the law of human dignity, the following are worth noting: 'Das Wort "transzendental" ist mehrdeutig.

analytical[37], phenomenological[38], empirical[39], evaluative[40]. Of those alternatives, the first four intimate aspects of the three stories told in Chapter One, the ontological, linguistic-analytical and phenomenological accounts of human dignity, namely the three lenses devised to look at and portray the practice of the law of human dignity in the text of judicial decisions. Other scholarly positions depart from efforts to substantively conceive the basis of universal validity[41] and restrict themselves to the realm of judicial practice, emphasizing instead 'the *institutional* use of the concept in human rights adjudication'[42] and proposing the 'establishment of a recognizably workable system of judicial interpretation and application of human rights.'[43]

Of the various issues traced in legal discourse on the law of human dignity, the delineation of the present study calls for emphasis on theoretical claims of redundancy[44], discord on the interpretation of human dignity as a meta-legal [*metajuristischer*] or positive law term[45], the meaning of inviolability

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Es bezeichnet zum einen ein Seiendes, das jenseits der Erfahrungswelt existiert und deshalb über die Möglichkeiten unserer Erfahrung hinausgeht. Zum anderen aber auch eine Idee, die zwar nicht Gegenstand einer Erfahrung sein kann, insofern also auch *jenseits* der Erfahrung liegt, aber in der Reflexion über die logischen Bedingungen der Erfahrung doch erkannt werden kann. […] Transzendentale Argumentation ist wie die formale Logik eine Technik des reinen Denkens. Sie unterscheidet sich jedoch von der formalen Logik darin, dass es ihr nicht darum geht, aus gegebenen Prämissen eine Konklusion deduktiv abzuleiten. Vielmehr geht es ihr darum, die kokludenten Voraussetzungen einer Behauptung ans Licht zu holen, also jene Voraussetzungen, die mit der Behauptung schon immer mitgedacht sein müssen, wenn die Behauptung überhaupt sinnvoll sein soll.']; See also Otfried Höffe, *Gerechtigkeit als Tausch? Zum politischen Projekt der Moderne* (Baden-Baden: Nomos Verlagsgesellschaft, 1991); ibid, *Political justice: foundations for a critical philosophy of law and the state* (Jeffrey C. Cohen tr, Cambridge, UK: Polity Press; Cambridge, MA: B. Blackwell, 1995)

[37] Tiedemann (n 33) 191 ff.

[38] ibid 195 ff.

[39] ibid 198 ff.

[40] ibid 200 ff.

[41] McCrudden (2008) 655, 710 ff.; Mutually responsive arguments: Paolo G. Carozza, 'Human Dignity and Judicial Interpretation of Human Rights: A Reply' (2008) 19(5) *EJIL* 931, 933 f.; McCrudden, ibid 712 f.

[42] McCrudden, ibid 712

[43] ibid 713 ['In this context, the concept of human dignity provides a useful, but limited, language with which to address certain institutional difficulties to which human rights adjudication gives rise.']

[44] Wihl, 'Wahre Würde' (2012) 187, 194ff.; ibid 197f. Other theoretical tendencies identified are: correspondence approaches, see Héctor Wittwer, 'Ein Vorschlag zur Deutung von Artikel 1 des Grundgesetzes aus rechtsphilosophischer Sicht' in Jan C. Joerden, Eric Hilgendorf, Natalia Petrillo & Felix Thiele (eds), *Menschenwürde und moderne Medizintechnik* (Baden-Baden: Nomos, 2011) 161; coherence approaches: Wihl, ibid 195f.; consensus approaches: Wihl, ibid 196f.; evidence approaches: Peter Badura, 'Generalprävention und Würde des Menschen' (1964) *JZ* 337 [violation-based perception of human dignity]; Wihl, ibid 197; and mixed theoretical approaches. Ultimately Wihl introduces a republican account of human dignity in a political process and demonstrates the supefluousness of the legal concept of human dignity, affirming, however, that it develops a progressive force and can bring about change. Wihl, ibid 199f.

[45] The meta-dimension and positive law character of human dignity are intertwined in the presently told story of 'something missing' and this is particularly evident in the phenomenological account, where parallels are drawn by reference to infinity and totality in the thought of Emmanuel Levinas.

[*Unantastbarkeit*], the prohibition of objectification and the practice of the guarantee of human dignity with reference to categorical imperatives or, rather, also through a balanced-out total consideration [*bilanzierende Gesamtbetrachtung*][46], and the assessment of how international and comparative law influence the production of human dignity meaning at the level of constitutional law[47]. The following analysis is woven around those issues.

Inviolability bespeaks the transcendental in that it introduces a tautological proposition into the text of the Basic Law and, as will be demonstrated in the analysis of case law in Chapter Two, tautologies signal transcendence in that they substantiate the limit to be traversed. The language of inviolability in Art. 1 sec. 1 GG brings forth the absolute character of the legal concept: the law of human dignity resists balancing.[48] In the recent *Aviation Security Act Case* the FCC, repeating established doctrine, noted:

> Human life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution [citing cases]. All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status [citing cases]. It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it [citing cases].[49]

The Court's argument originates in Art. 1 sec. 1, and demonstrates, according to a somewhat reversed reading of this passage, first, that the inviolability (*Unantastbarkeit*) of human dignity as an 'essential constitutive principle' and the highest value of the Basic Law is *de facto* immanent to human beings by virtue of being human, and, as such, cannot be deprived from them. Consequently, Art. 1 sec. 1 provides that the state shall – but also, it appears, can only – guarantee the claim to respect and protection of human dignity founded precisely on the recognition of – *de facto* – inviolability.[50]

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[46] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 6
[47] ibid
[48] Dieter Hömig, 'Die Menschenwürdegarantie des Grundgesetzes in der Rechtsprechung der Bundesrepublik Deutschland' (2007) *EuGRZ* 633, 640; Kunig, Art. 1, *GG Kommentar* (2012) para 4
[49] BVerfGE 115, 118 (152); Doctrine: BVerfGE 39, 1 (42) (1975) [*Abortion I*]; 72, 105 (115) (1986) [*Life Imprisonment*]; 109, 279 (311) (2004) [*Großer Lauschangriff*]
[50] One could imagine possible courses of critical reflection on this doctrine. Undoubtedly, it refines the meaning of the constitutional guarantee. Could it be understood as drawing on Habermas' distinction between facts in discourse and objects of experience, followed by relevant insights in the work of other theorists? By establishing a distinction between facts and objects of experience, Habermas effectively locates discourse, here legal discourse, at a level eclectically detached from experience, yet related to it

Hermeneutics is integral to doctrinal discourse. Hoerster argues that the meaning of Art. 1 sec. 1 GG ensues from a harmonized reading of sent. 1 and sent. 2 leading to the assertion that the phrasing '*ist unantastbar*' in sent. 1 establishes a 'shall' [*soll*] rather than merely a 'can' [*ken*][51]. The distinction might be seen as a benign definitional remark; nevertheless, its significance lies in the manifest effort to refine the meaning and practice of Art. 1 sec. 1 GG by striving for 'clear and

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thanks to his definition of the notion of fact. Habermas' consensus theory of truth, in maintaining rational argumentation at the intersection between the 'factual' and the ideal speech situation, preserves internal coherence. Habermas draws a sharp distinction between normative statements and value judgments on the one hand and empirical statements on the other. While justification of the former rests on their correctness, empirical statements' justification is conditional on their truth. The interdependence of correctness and truth is the core theme of Habermas's consensus theory of truth. See Jürgen Habermas, 'Vorbereitende Bemerkungen zu einer Theorie der kommunikativen Kompetenz' in Jürgen Habermas & Niklas Luhmann (eds), *Theorie der Gesellschaft oder Sozialtechnologie – Was leistet die Systemforschung?* (Frankfurt am Main: Suhrkamp, 1971) 101, 119; Cf. Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (first published in English in 1922, with an Introduction by Bertrand Russell, F. R. S., C. K. Ogden ed and tr, London: Kegan Paul, Trench, Trubner & Co., Ltd., New York: Harcourt, Brace & Company, Inc., 1922, Project Gutenberg EBook 5740, release date: October 22, 2010) (4.061) ['If one does not observe that propositions have a sense independent of the facts, one can easily believe that true and false are two relations between signs and things signified with equal rights. […]']; ibid (4.062) ['[…] For a proposition is true, if what we assert by means of it is the case. […]']; ibid (6.1222) ['This throws light on the question why logical propositions can no more be empirically established than they can be empirically refuted. Not only must a proposition of logic be incapable of being contradicted by any possible experience, but it must also be incapable of being established by any such.']; For Strawson '[f]acts are what statements (when true) state; they are not what statements are about.' In Peter Frederick Strawson, 'A Problem about Truth: A reply to Mr. Warnock' in George Pitcher (ed), *Truth* (Englewood Cliffs, NJ: Prentice Hall, 1964) 32, 38; According to Patzig, facts are 'essentially language-dependent' in Günther Patzig, 'Satz und Tatsache' in ibid, *Sprache und Logik* (Göttingen: Vandenhoeck & Ruprecht, 1970) 39; Habermas distinguishes between two forms of communication, *Hanldung* (action) and *Diskurs* (discourse). In both forms speech acts pass on the asserted meaning. In *Handlung* claims to validity, albeit unstated in speech acts, are nevertheless recognized as implicitly present. See Jürgen Habermas, 'Wahrheitstheorien' in Walter Schultz & Helmut Fahrenbach (eds), *Wirklichkeit und Reflektion, Festschrift für Walter Schultz zum 60. Geburtstag* (Pfullingen: Verlag Gunther Neske, 1973) 211, 214. *Diskurs* is occupied with examining the soundness of controversial claims to validity. In light of the *Handlung* and *Diskurs* distinction, fact is 'what a discursively justifiable statement states.' See also Robert Alexy, *A Theory of Legal Argumentation – The Theory of Rational Discourse as Theory of Legal Justification* (Ruth Adler & Neil MacCormick trs, Oxford: Oxford University Press, 1989) 107; ibid 103-107; Whether this theory amounts to an appropriate, or sterilized – as compared to other approaches – account of the practice of human dignity in law cannot be estimated without resort to alternatives. Reference to one alternative is deemed necessary here. MacKinnon notes: 'The fact that a norm is not lived up to or delivered upon with consistency does not mean that it is not a norm. […] Virtually no one says they support sex discrimination. […] Despite the level of acceptance of sex equality as a principle, women's actual second-class status continues to be concealed, therefore maintained, by pervasive practices, among which is the tendency of law to present functioning divisions of power as a discourse of ideas of right and wrong, garbing politics as morality. If the equality of the sexes is recognized to be a fact, equalizing socially unequal groups is merely a problem to be solved. But if sex equality is seen as a value, it can be accepted or rejected as one side in a normative discussion. In policy, a fact is either reflected or distorted; a value can be debated endlessly. Its recognition ebbs and flows with time and place, majorities and hegemonies.' In MacKinnon, *Are Women Human?* (2006) 10; The two approaches are premised on different perceptions of the notion of 'fact'. This has implications not only for the treatment of values, but also, with a view to present purposes, for how practicing the law of human dignity could be portrayed.

[51] Norbert N. Hoerster, 'Zur Bedeutung des Prinzips der Menschenwürde' (1983) Heft 2 *JuS* 93

meaningful speech'[52]. In that sense, what spurs this doctrinal remark stands close to the methodology and ends of the present analysis.

The doctrinally established distinction between inviolability, on the one hand, and the claim to respect guaranteed in the Basic Law on the other is directly related to the debate on the descriptive or prescriptive meaning of the phrase '*ist unantastbar*', translated into 'is' or 'shall be inviolable', in Art. 1 sec. 1 GG in German legal doctrine.[53] Looking at the doctrinal distinction through the presently instituted lens conveys new facets of the complexity of practicing human dignity language in law; the descriptive and the prescriptive overlap and feed on each other. The presence of the word 'human' in 'human dignity' and the tautology prevalent in the proposition that the Basic Law guarantees the dignity of human beings *qua* beings attest to such overlapping and mutual responsiveness between the two understandings.[54]

In German legal doctrine and FCC jurisprudence[55] the *Objektformel* put forward by German constitutional scholar and lead Basic Law commentator in the

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[52] Alexy, A Theory of Legal Argumentation (1989) 144-145

[53] For a comprehensive reference to sources of arguments in this debate among German legal scholars, see Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 131 fn 428; Questioning the importance of this doctrinal debate, Wihl, 'Wahre Würde' (2012) 187, 188 ['Geradezu klassisch ist die Fragestellung, ob Menschenwürde als deskriptiver oder als normativer Begriff zu deuten ist. Ihr wird hier oftmals Ambiguität bescheinigt und daraus gelegentlich ein rechtliches Problem konstruiert. Doch ist dieses Problem wenigsten rechstdogmatisch gar keines: Denn da die Menschenwürde im Kontext ihrer postulierten Unantastbarkeit steht, ist es gleichgültig, ob man das Wort "ist" als "soll sein" liest oder schon die Menschenwürde selbst als normativ versteht. In beiden Fällen misst man ihr einen normativen Rang zu.']

[54] Dieter Grimm, *Die Würde des Menschen ist unantastbar* (Vortrag auf dem Festakt der Stiftung Bundespräsident-Theodor-Heuss-Haus zum 60jährigen Bestehen des Grundgesetzes am 8. Mai 2009) 10 [referring to reactions to the phrasing of the proposition under Art. 1 GG, Grimm explains that the misunderstanding lies in that the Basic Law is a legal text and legal texts are normative texts. That is, even when they indicate, they do not describe a reality, but rather formulate a 'shall', a prescription. It should be noted that the emphasis on the descriptive meaning of human dignity is defined by the methodological lens through which this proposition is looked at, namely the hermeneutic and literary approach to the constitutional text.]

[55] Established fully in BVerfGE 27, 1 (6) (1969) [*Mikrozensus*] ['Im Lichte dieses Menschenbildes kommt dem Menschen in der Gemeinschaft ein sozialer Wert- und Achtungsanspruch zu. Es widerspricht der menschlichen Würde, den Menschen zum bloßen Objekt im Staat zu machen [cited cases omitted]. Mit der Menschenwürde wäre es nicht zu vereinbaren, wenn der Staat das Recht für sich in Anspruch nehmen könnte, den Menschen zwangsweise in seiner ganzen Persönlichkeit zu registrieren und zu katalogisieren, sei es auch in der Anonymität einer statistischen Erhebung, und ihn damit wie eine Sache zu behandeln, die einer Bestandsaufnahme in jeder Beziehung zugänglich ist.']; Cf. BVerfGE 30, 1 (25f.) (1970) [*Abhörurteil*] ['Allgemeine Formeln wie die, der Mensch dürfe nicht zum bloßen Objekt der Staatsgewalt herabgewürdigt werden, können lediglich die Richtung andeuten, in der Fälle der Verletzung der Menschenwürde gefunden werden können. Der Mensch ist nicht selten bloßes Objekt nicht nur der Verhältnisse und der gesellschaftlichen Entwicklung, sondern auch des Rechts, insofern er ohne Rücksicht auf seine Interessen sich fügen muß. Eine Verletzung der Menschenwürde kann darin allein nicht gefunden werden. Hinzukommen muß, daß er einer Behandlung ausgesetzt wird, die seine Subjektqualität prinzipiell in Frage stellt, oder daß in der Behandlung im konkreten Fall eine willkürliche Mißachtung der Würde des Menschen liegt. Die Behandlung des Menschen durch die öffentliche Hand, die das Gesetz vollzieht, muß also, wenn sie die

1950s, During[56], embodies what has been registered as the Kantian[57] prohibition of human beings' instrumentalization on account of the absolute value of reason-determined existence. The *Objektformel*[58], according to, first, During and, later, FCC jurisprudence, prohibits rendering the human being a mere object[59] of state action, and, so it is argued, encapsulates the Basic Law's reaction to National Socialism[60]. Deviation from the absolute guarantee of human dignity and engagement in balancing, that is, specifically in practicing the principle of proportionality, is justified only in human dignity v. human dignity collisions.[61] Does the absolute character of human dignity call for formal adherence to a categorical imperative, or for balancing and *ad hoc* appreciation of a violation? Those opting for *'bilanzierende Konkretisierung'* [concretization ensuing from balancing] *and 'worsened*

Menschenwürde berühren soll, Ausdruck der Verachtung des Wertes, der dem Menschen kraft seines Personseins zukommt, also in diesem Sinne eine "verächtliche Behandlung" sein.']; Cf. first cases in that direction BVerfGE 5, 85 (204) (1956) [*KPD-Verbot*] ['In der freiheitlichen Demokratie ist die Würde des Menschen der oberste Wert. Sie ist unantastbar, vom Staate zu achten und zu schützen. Der Mensch ist danach eine mit der Fähigkeit zu eigenverantwortlicher Lebensgestaltung begabte "Persönlichkeit". Sein Verhalten und sein Denken können daher durch seine Klassenlage nicht eindeutig determiniert sein. Er wird vielmehr als fähig angesehen, und es wird ihm demgemäß abgefordert, seine Interessen und Ideen mit denen der anderen auszugleichen. Um seiner Würde willen muß ihm eine möglichst weitgehende Entfaltung seiner Persönlichkeit gesichert werden.']; BVerfGE 7, 198 (205) [*Lüth*] ['Diesen Sinn haben auch die Grundrechte des Grundgesetzes, das mit der Voranstellung des Grundrechtsabschnitts den Vorrang des Menschen und seiner Würde gegenüber der Macht des Staates betonen wollte. Dem entspricht es, daß der Gesetzgeber den besonderen Rechtsbehelf zur Wahrung dieser Rechte, die Verfassungsbeschwerde, nur gegen Akte der öffentlichen Gewalt gewährt hat.']

[56] Günter Dürig, 'Die Menschenauffassung des Grundgesetzes' (1952) 7 *Juristische Rundschau* 259; ibid, 'Der Grundrechtssatz der Menschenwürde – Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes' (1956) 81 *AöR* 117, 127; ibid, Art. 1 Abs. 1, in Theodor Maunz & Günter Dürig (eds), *Grundgesetz: Kommentar* (Erstbearbeitung, Bd. I, München: Verlag C. H. Beck, 1958) para 28

[57] Hoerster (1983) 93, 93

[58] Christian Starck, 'Menschenwürde als Verfassungsgarantie im modernen Staat' (1981) *JZ* 457, 459f. [lists cases of objectification]; Grimm, *Die Würde des Menschen ist unantastbar* (2009) 13 ['*präzisierungsbedürftig'* as human beings are often objectified without thus experiencing a violation of their human dignity]

[59] BVerfGE 30, 1 (25f.) (1970) [*Abhörurteil*] [expressing scepticism with respect to the applicability of the *Objektformel*]; Friedhelm Hufen, 'Erosion der Menschenwürde?' (2004) *JZ* 313, 317 [not all instances of objectification are prohibited, but rather those rendering the human being 'merely' an object]; Matthias Mahlmann, 'Human Dignity and Autonomy in Modern Constitutional Orders' in Michel Rosenfeld & András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press, 2012) 370, 379 fn 54; See also Michael Köhne, 'Abstrakte Menschenwürde?' (2004) *GewArch.* 285; See further distinctions and examples of objectification of human beings in Avishai Margalit, *The Decent Society* (Cambridge, Mass.: Harvard University Press, 1996) 91f.

[60] Hufen (n 59); Cf. Gerald Neuman, 'On Fascist Honour and Human Dignity: A sceptical response' in Christian Joerges & Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe – The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford and Portland, Oregon: Hart Publishing, 2003) 267

[61] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 133

Gesamtwürdigung' [overall evaluation assessment] approaches[62], sophisticatedly argue for balancing anterior to actual practice in the legal text of judicial decisions.

How are objectification language and the principle of proportionality of relevance to the present enterprise? The former is strongly evocative of a specific image and, from a literary and hermeneutic perspective, incites critical reflection on the meaning produced and the human image portrayed in human dignity language games where it is practiced. How should this doctrine be understood when practiced as language to secure law's humanism? What could the, literary and hermeneutic, implications of instituting it within legal language games be? Practicing the latter, as shown in the phenomenological account of human dignity, marks the meta-dimension of law. Where the principle of proportionality is applied in legal argumentation, namely found in the legal language game produced regardless of whether it is considered ultimately a constitutionally permissible tool for deciding the human dignity conflict, it occasions the formation of an intersubjective space within the legal text, namely a field of dialogue and, at the same time, an opportunity for the origination of meaning in pluralism.

That the subjective protective scope of Art. 1 sec. 1 GG [*des Mencken*] in German legal doctrine includes every human being and is deliberately left open, triggers an ontological story of 'something missing' in Chapter One, grounded in reflections on rights in the thought of French philosopher Jacques Rancière. Solely the origin from a human being determines who the human being is.[63] The *Menschenbild* of the Basic Law has no prescribed specific characteristics, and thus remains attuned to the pluralism of human images and lived experience. Lehmann's *Leistungstheorie,* in line with Hegel's understanding of human dignity as an acquired quality rather than a worth attributed to human beings by virtue of being human is, hence, for the most

[62] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 46 ff.; See also Winfried Brugger, 'Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter?' (2001) 4 *JZ* 165 [revisiting the taboo subject of torture]; Günter Frankenberg, 'Torture and Taboo: An Essay Comparing Paradigms of Organized Cruelty' (2008) 56(2) *The American Journal of Comparative Law* 403 [comparative approach to torture and misunderstandings about torture as organized state cruelty; deconstruction of the exceptionalism of 'modern torture' based on the contention of a nexus between law and the rescue motive]

[63] Dreier draws attention to the fact that human dignity is, nevertheless, a constitutional concept, a fundamental right; hence, the meaning of 'des Menschen' in Art. 1 sec. 1 GG does not imply an expansion of the concept's subjective scope quantitatively to include beyond Germans, for instance, Americans, Greeks etc. as human beings, but rather emphasizes that human dignity is guaranteed in the Basic Law to all, in other words regardless of specified characteristics. The fact of mere existence is the critical parameter for attributing human dignity paradigmatically even to the unborn life. In BVerfGE 132, 134 (2012) [*Asylbewerberleistungsgesetz*] the FCC extended the guarantee of a dignified existence minimum to foreigners living in Germany. See Dreier (n 61)

part, not applauded by legal scholars. Art. 1 sec. 1 GG guarantees the human dignity of each individual, not of humanity as an abstract notion; this clarification has implications particularly for the practice of human dignity in cases where qualitative aspects of the character and actions of human beings are considered vital in the assessment of the gravity of the violation.

The meta-dimension of the law of human dignity is presently interpreted and understood as being interwoven with the *Menschenbild*[64] of and the preambular reference to 'God' in the Basic Law. Put differently, the transcendental character of the law of human dignity and fundamental rights is associated with the ethics surfacing in the constitutional text. Former Justice and constitutional scholar Böckenförde stresses[65] the importance of holding on to the pre-state and meta-constitutional fundamental provision of human dignity [*vorstaatlichen und meta-verfassungsrechtlichen Grundsatz der Menschenwürde*][66] as the basis of a prohibition of balancing the law of human dignity with other fundamental rights.[67] Of course, the concrete human dignity of those experiencing harm or deadlock should not be obscured by the meta-conceptualization of the guarantee of human dignity.[68] Emphasis on concrete particulars is, thus, imperative and, granted, foundational to the interrelation between human dignity and equality.[69] Minding that the anthropological image of the constitution, the *Menschenbild* of the Basic Law, is portrayed as a self-determined yet socially bound individual[70], practicing the duty to respect and protect human dignity humanely[71] presupposes understanding this law as both a principle of

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[64] Christian Starck, Art. 1 Abs. 1, in Hermann von Mangoldt, Friedrich Klein & Christian Starck (eds), *Das Bonner Grundgesetz. Kommentar* (seit 1953, 6th edn, München: Verlag Vahlen, 2010) para 7 ['Die Verantwortung vor Gott im Zusammenhang mit der Verantwortung vor den Menschen bringt ein Menschenbild zum Ausdruck, das metaphysische Wurzeln hat […]']; Wolfgang Spellbrink, 'Zur Bedeutung der Menschenwürde für das Recht der Sozialleistungen' (2011) *DVBl* 661, 661 ['Whoever speaks about human dignity, must at the same time clarify its *Menschenbild.*']

[65] Ernst-Wolfgang Böckenförde, 'Die Menschenwürde war unantastbar' *Frankfurter Allgemeine Zeitung* (3 September 2003) 33

[66] Hufen (2004) 313, 314

[67] Hufen ibid; Starck (n 64)

[68] Böckenförde (n 65)

[69] Baer, 'Triangle' (2009) University of Toronto Law Journal 417

[70] Ulrich Becker, *Das 'Menschenbild des Grundgesetzes' in der Rechtsprechung des Bundesverfassungsgerichts* (1st edn, Berlin: Duncker & Humblot, 1996)

[71] Christos Yannaras, *The inhuman character of human rights* [*Η απανθρωπία του δικαιώματος*] (Athens: Domos, 1998) [Yannaras inquires into how human rights can be humane, rather than rejected altogether. He criticizes the formal, impersonal, face-less, thus inhuman, portrayal of the human being in human rights. Parallels may be drawn between his ideas and the thought of Emmanuel Levinas, in Emmanuel Levinas, *Totality and Infinity – An Essay on Exteriority* (first published in 1961, with an Introduction by John Wild, Alphonso Lingi tr, Pittsburgh, Pa.: Duquesne University Press, 1969)]

the state [*Staatsgrundsatz*] and a subjective right[72] that enables individual human beings to institute their own image within the realm of law.

The practice of the constitutional guarantee of human dignity in courts' jurisprudence could be rendered as systematic and non-transcendental, merely the result of abiding by time-honored doctrine and actuating the methods of interpretation at our disposal. The transcendental is understood here as the threshold of escape from the cluster of what lies before our eyes and is thus at our disposal, and as an intimation of the meta-dimension extending beyond the broad waves of the ocean of discourse on human dignity and the universals and particulars surfacing in the practice of the law of human dignity. Those who understand constitutional law as a closed system or, adopting the language of French philosopher Emmanuel Levin's[73], as a totality, tend to reject the transcendental as irrelevant or nonsensical: what is ungraspable has no place within a totality structure.

The Preamble to the German Basic Law, however, points to law's meta-dimension. The Preamble states the tasks, the genesis, the meaning and purpose of the Basic Law. Composing it presented challenges of distinctly literary and rhetorical nature, as the text had to retain a legal tone, while disclosing the *Pathos* driving the *pouvoir constituant*[74]. The drafters concluded on the final form of the Preamble after much consideration, emending and contemplation about the factors that rendered the Basic Law exceptional a constitutional document.[75] Preambular propositions encapsulate the spirit of constitutional propositions and are thus a valuable source of insights for interpreting those and addressing questions of political nature.[76] The Preamble to the German Basic Law reads:

> Conscious of their responsibility before God and human beings, moved by the purpose to serve world peace as an equal part in a unified Europe, the German People have adopted, by virtue of their constituent power, this Constitution. […]

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[72] Hufen (n 66) 314f.

[73] French philosopher of Lithuanian Jewish ancestry.

[74] Hermann von Mangoldt, *Das Bonner Grundgesetz. Kommentar* (Berlin, Frankfurt a.M.: Franz Vahlen GmbH., 1953) 29; ibid 29 ['[…] in wenigen markanten Strichen […] Das in Kürze zu tun, dabei im Gesetzstil zu bleiben und doch auch das Pathos zu wahren, das zu einem Vorspruch nun einmal gehört, bot bei der Fülle der anzuschneidenden Fragen erhebliche Schwierigkeiten.']; From a hermeneutic and literary perspective, the stylistic direction to produce a text that is short and impactful and the struggle to achieve compliance with legal-style phrasing, while communicating the passion and aspirational tone of the Preamble all convey consciousness of and intention to grant this text a specific rhetorical character and significance.

[75] ibid 30

[76] ibid

This preambular formulation of responsibility evidently conveys the desire of the drafters of the Basic Law to distance the thereby established constitutional state from the historical background of National Socialism. How is the German people's consciousness[77] of their responsibility 'before God and human beings'[78] to be interpreted and understood? In this study, preambular reference to 'God' is understood as a substantiation of the meta-dimension of the Basic Law and is associated with the notion of the limit, that is, the limit of the state and of law[79] as, respectively, the self with critical authority over meaning and the lens through which that self looks when practicing the law of human dignity.[80] This excerpt is the distillation of the state of knowledge 'on the limits of human capability'[81]. In accordance with the original intent of the representative of the Free Democratic Party in the Parliamentary Council and first President of the Federal Republic, Theodor

[77] For a critical appreciation of collective consciousness apropos the modern notion of human dignity, which touches on possible pitfalls of the authority over meaning portrayed in the linguistic-analytical account *infra*, see Aurel Kolnai, 'Human Dignity Today' in Graham McAleer (ed), *Politics, Values and National Socialism* (Francis Dunlop tr, New Brunswick, NJ: Transaction Publishers, 2013) 215 ['Let us not forget the increase of universal "nationalism" in its contemporary sense: that is, the demand of every self-nominated "nation", or rather of every social milieu determinable in any way (even when it is no more than experimental and programmatic) […] that it be made capable, or that promises be made to make it capable, of constituting itself as a unit of collective consciousness and politcall will, … the demand, I say of every "nation" in some sense of the word, to be governed by its own human kind, so to speak; […] humanity tends not to tolerate the sovereignty over him of any other human *type* […]. We may perhaps sum up the modern rise of human dignity in the following words: the attempt to bring about the integral self-rule of man *qua* man, of man *qua* any human being, and for that reason of man *qua* integrated humanity, is in the ascendant; a self-rule inseparable from the penetration and subjugation of extra-human reality. In this context human dignity appears primarily under the aspect of human *power* – human in its full sense, but for that reason, apart from the intellectual proficiency such power implies, having *moral* implications regarding the web of relations within the human collective.']; See also on consciousness of collective identity and collective consciousness, as well as whether these amount to *'kollektive Güter'*, Michael Anderheiden, *Gemeinwohl in Republik und Union* (Tübingen: Mohr Siebeck, 2006) 571-75

[78] Theodor Maunz, Präambel, in Theodor Maunz & Günter Dürig (eds), *Grundgesetz: Kommentar* (Erstbearbeitung, Bd. I, München: Verlag C. H. Beck, 1958) para 20 [Responsibility before human beings suggests the commitment to actions compatible with the constitution, rather than a concrete duty vis-à-vis other legal actors in the state.]; In German legal scholarship this commitment is associated predominantly with a distancing from the National Socialist regime, the limits of the *pouvoir constituant*, and the rejection of totalitarian state models, see Christian Starck, Präambel, in Hermann von Mangoldt, Friedrich Klein & Christian Starck (eds), *Das Bonner Grundgesetz. Kommentar* (seit 1953, 6th edn, München: Verlag Vahlen, 2010) para 36

[79] See also BVerfGE 30, 1 (26) (1970) [*Abhörurteil*] ['[…] Die Behandlung des Menschen durch die öffentliche Hand, die das Gesetz vollzieht, muß also, wenn sie die Menschenwürde berühren soll, Ausdruck der Verachtung des Wertes, der dem Menschen kraft seines Personseins zukommt, also in diesem Sinne eine "verächtliche Behandlung" sein.']

[80] Parallels can be drawn between this portrayal of law as a lens applied by state actors with authority over the production of meaning and Günter Frankenberg, *Autorität und Integration: Zur Grammatik von Recht und Verfassung* (2003) [Frankenberg critically approaches the authority of the constitution and law more generally to produce binding decisions and further social integration. The model I put forward constitutes merely a figurative representation of the constellation of dynamics in these processes.]

[81] Starck (n 78) para 36

Hues[82], who proposed the introduction of this clause into the Preamble, the asserted limit serves to harmonize differences of opinion in an ideologically pluralistic state.[83]

Insisting on the interpretation of this proposition apropos the notion of the limit, the phrase 'before God' suggests that the state, as an institution[84], is not limitless in practicing the law within its jurisdiction, in other words may not touch on all aspects of human life. Allusion to 'God' in the Preamble as paired with the notion of responsibility is not an *invocation Dei*[85], according to the majority of voices in German legal scholarship, though critical remarks on the inclusion of such language in the Preamble are also uttered. The latter express scepticism as regards the contented intention of the drafters to retain neutrality and permit pluralism; rather, it is argued, reference to 'God' implicitly attests to a collective recognition of transcendence.[86]

The stance adopted here is responsive to both positions. Telling a story of 'something missing', I identify the meta-dimension or 'God' with 'something always missing', an infinite plane, void of meaning, potentially enabling all concrete particular beliefs to manifest themselves in life and law. In that sense, my account proposes an alternative portrayal of the former position on the one hand. The story of 'something missing' moreover discharges the scepticism of the latter position; collective recognition of transcendence need not foreclose the possibility of pluralism

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[82] Hermann von Mangoldt, *Das Bonner Grundgesetz. Kommentar* (1953) 20 ['Nach erfolglosem erstem Wahlgang wurde Prof. Dr. Theodor Heuss mit 416 von den abgegebenen 800 Stimmen gewählt […]']

[83] Maunz (n 78) para 18

[84] Margalit, *The Decent Society* (1996) 27 [In a decent society institutions do not humiliate people by any means, and especially so by law.]

[85] Cf. the preambular presence of 'God' in the constitutions of Switzerland (1874), Ireland (1937) and Greece (1975); Starck (n 78) para 36 fn 115; See also Dieter Grimm, 'Conflicts between General Laws and Religious Norms' (2009) 30 *Cardozo Law Review* 2369

[86] Cf. Christian Hillgruber, 'Kommentar' in Horst Dreier (ed), *Säkularisierung und Sakralität. Zum Selbstverständnis des modernen Verfassungsstaates* (Tübingen: Mohr Siebeck Verlag, 2013) 119, 128 ['Was die religiöse, in Sonderheit christliche Imprägnierung des positiv geltenden Verfassungsrechts angeht, so sind die frühen Länderverfassungen der unmittelbaren Nachkriegszeit eine wahre Fundgrube; aber auch im insoweit deutlich zurückhaltenderen Grundgesetz finden sich immer noch mehr als nur Spurenelemente. Dies beginnt bereits mit der von *Dreier* nicht erwähnten *nominatio dei* in der Präambel. Die Formel von der "Verantwortung vor Gott" wird zumeist, auch von *Horst Dreier*, als bloße Demutsformel abgetan. Die Absage an staatlich Hybris und Allmachtsphantasien hätte indes auch religionsneutral bzw. –frei ausgedrückt werden können. Nach einer im Parlamentarischen Rat geäußerten Auffassung sollte indes mit der angesprochenen Verantwortung vor Gott auch verdeutlicht werden, dass das Grundgesetz "seine fundamentalen Wurzeln letzen Endes auch im Metaphysischen findet". Selbst wer dies kritisch sieht, wird indes nicht bestreiten können, dass das Deutsche Volk, indem es sich als Verfassunggeber Gott gegenüber verantwortlich erklärt, sich kollektiv zur Transzendenz bekennt und implizit den Atheismus ablehnt, ohne damit – versteht sich – den Einzelnen zu einem Gottesglauben verpflichten zu können oder auch nur zu wollen.']

and intersubjectivity[87]. What is more, those who exclude themselves from a collective transcendence thus conceived are not thereby excluded from the realm of law or life, since all that is not 'something missing' is essentially 'what is there'. In other words, my approach imbues the affirmative stance towards 'something missing' in the interpretation of 'God' in the Preamble to the Basic Law.

It is argued that 'God' signals the rejection of totalitarian state models,[88] and essentially underscores that state power is limited.[89] In uttering a statement of responsibility 'before God and human beings' in the Preamble, the members of the Parliamentary Council proclaimed that their authority to create the Basic Law was not grounded in unlimited and unconditional state and popular sovereignty. This stance permeates the unbroken practice of the Basic Law to date[90]. Many of the members of the Parliamentary Council were convinced of the existence of norms that supervene upon and precede the state[91], regardless of how they are established. Pre-state norms cannot be exceeded even by the constituent assembly in the practice of its *pouvoir constituent*.[92] One prominent commentator of the Basic Law stated:

> Responsibility before God and human beings neither denies nor impairs the *pouvoir constituent* of the people, but rather delimits its inherent decision-making function [*Entscheidungsfunktion*].[93]

How is this 'inherent decision-making function' delimited? The meaning of the limit is not further specified in this account[94]. A parallel can be drawn between the

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[87] In the same direction, see Alec Stone Sweet, 'Constitutionalism, Legal Pluralism, and International Regimes' (2009) 16(2) *Indiana Journal of Global Legal Studies* 621 [legal pluralism is not necessarily antithetical to constitutionalism]

[88] Starck, Präambel, *GG Kommentar* (2010) para 36 fn 115; Peter Häberle, '"Gott" im Verfassungsstaat' in Walther Fürst, Roman Herzog & Dieter C. Umbach (eds), *Festschrift für Wolfgang Zeidler* (Bd. 1, Berlin, New York: de Gruyter, 1987) 3, 11f.; Horst Dreier, Präambel, in Horst Dreier (ed), *Grundgesetz. Kommentar* (seit 1996, Bd. 1, A. 1-19, 2nd edn, Tübingen: Mohr Siebeck, 2004) para 28; Ingo von Münch, Präambel, in Ingo von Münch & Philip Kunig (eds), *Grundgesetz-Kommentar* (seit 1974, Bd. 1: Präambel bis Art. 69, 6th edn, München: Verlag C. H. Beck, 2012) para 8

[89] Starck, ibid para 36 [The metaphysical position of the human being professes the relativity of all state power and the relativity of meaning: 'Der Staat soll begrenzt sein und soll nicht über alles verfügen dürfen.']; ibid para 37 ['Diese Absage an jeden prometheischen Größen wahn und Mahnung zur Bescheidenheit verbieten z.B. eine Politik, die den Menschen kulturrevolutionär verändern, den "wahren Menschen" erst hervorbringen will, die den im Menschen steckenden homo religiosous nicht anerkennt, der nach Anfang, Ende und Sinn des Daseins fragt, der rational nicht erklärbares Vertrauen und Hoffnung hat.']; Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 7 [metaphysical basis and ontological-anthropological foundations of the law of human dignity]

[90] Maunz, Präambel, *Grundgesetz: Kommentar* (1958) para 17

[91] See Christoph Enders, *Die Menschenwürde in der Verfassungsordnung: zur Dogmatik des Art. 1 GG* (Jus Publicum, Bd. 27, Tübingen: Mohr Siebeck, 1997) 414ff.

[92] Maunz (n 90)

[93] ibid para 17-18

ad hoc determination of the meaning of the limit[95] and the proposition that the concretization of human dignity should only be performed *ad hoc* in FCC jurisprudence[96]. Dreier concludes that the meaningful practice of the objective law of human dignity presupposes concentration on the concrete subject, the particular human being[97]. The law of human dignity guarantees respect for the individual worth of every human being vis-à-vis interference by the state and society.[98] The limit signifies the self-relativization [*Selbstrelativierung*][99] of legally bound state power, which emanates directly from the responsibility of the German people before God and human beings[100], as much as it conveys the anthropocentricism of the state.[101] As binding on all branches of state power and directly valid under Art. 1 sec. 3 GG[102], fundamental rights seal the Basic Law's anthropocentric orientation.

The Preamble institutes the limit to the inherent decision-making function of all state power, alludes to the limits of the human condition, and declares the dual responsibility before the 'other', fellow human beings, and the 'Other', as indicated in the thought of Levin's, or 'God' as in the Preamble to the Basic Law. This study adopts an affirmative stance towards the implications of the limit introduced exceptionally by the constitutional guarantee of human dignity into the Basic Law, and puts forward an understanding of the limit as the ontological, linguistic-analytical and phenomenological prerequisite of escaping towards the infinite, of transcending.

> This reference to oneself is precisely what one states when one speaks of the identity of being. Identity is not a property of being, and it could not consist in the resemblance between properties that, in themselves, suppose identity. Rather, it expresses the sufficiency of the fact of being, whose absolute and definitive character no one,

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[94] ibid para 17
[95] ibid
[96] Established in BVerfGE 30, 1 (25) (1970) [*Wiretapping Case, Abhör Urteil*]; For a minimalist and context-specific delineation of human dignity meaning see Hilgendorf, 'Instrumentalisierungsverbot und Ensembletheorie' (2010) 1653, 1653ff.; Critically, Baer, 'Triangle' (2009) University of Toronto Law Journal 417, 447 ['One may feel tempted, indeed, to supplement the abstract notion of a foundational right or value with the very concrete notion of dignity as a right against extreme cases such as torture or cruel and degrading punishment. While this understanding of dignity served as building block for a global consensus, at least for a while, it also removed cases from more precise ways of inspecting them as violations of fundamental rights. Dignity has been seen as inviolable and of untouchable importance, but this has also left us unable to address what happens when human dignity is violated.']
[97] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 117
[98] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 1
[99] ibid
[100] ibid
[101] ibid, para 2
[102] ibid, para 4

> it seems, could place in doubt. And Western philosophy, in effect, has never gone beyond this. In combating the tendency to ontologize [*ontologisme*], when it did combat it, Western philosophy struggled for a better being, for a harmony between us and the world, or for the perfection of our own being. Its ideal of peace and equilibrium presupposed the sufficiency of being. The insufficiency of the human condition has never been understood otherwise than as a limitation of being, without our ever having envisaged the meaning of 'finite being'. The transcendence of these limits, communion with the infinite being, remained philosophy's sole preoccupation…[103]

As demonstrated in the elaboration on the Preamble to the Basic Law *supra*, positions on law's meta-dimension and the transcendental, indeed indicative of divergence in the discourse, are not premised on an affirmative stance towards 'something missing'. This does not mean that they all necessarily adopt a negative stance; for instance, those upholding the presence of 'God' in the Preamble, clarify that ideological neutrality is retained and essentially opt for non-definition. Those criticizing the implied participation in a collective transcendence consider allusions to transcendence as such problematic, because they, automatically, associate this with the requirement of connotation of a specific, personal 'God'. It could be said that only those advancing 'empty box' or 'black box' criticism or *Leerformel* contentions are probably negatively predisposed against a story of 'something missing'.

How is an affirmative stance towards 'something missing' understood in my approach? I set up a model through which instances of practicing the law of human dignity can be portrayed. The three layers of this model, the ontological, grounded in the thought of the Presocratic philosopher Heraclitus, the feminist legal scholar Catherine MacKinnon, the French philosopher Jacques Rancière and the Argentinean political theorist Ernesto Laclau, the linguistic-analytical, drawing predominantly on Ludwig Wittgenstein's *Tractates Logico-Philosophicus* (1922), and the phenomenological, premised on concepts in *Totality and Infinity – An Essay on Exteriority* (1961) by French philosopher Emmanuel Levin's, set up a lens through which I invite jurists to look at the practice of the law of human dignity. All three accounts spring from a literary and hermeneutic emphasis on the 'human' component of the composed term 'human dignity', contribute elements to the constructed model, and offer insights into the transcendental, law's meta-dimension, the notion of the

[103] Emmanuel Levinas, *On Escape/De L' Evasion* (first published in 1935, Stanford, CA: Stanford University Press, 2003) 51

limit, what lies within it and how we conceive of the infinite space beyond it, the dual sense of 'something missing', the human image, as well as language encountered often in the practice of the law of human dignity, such as the notion of the absolute or morality, and concepts, such as freedom or equality.

In the following pages I set up a lens through which to look at the mobilization of human dignity language in legal texts. Then, applying that lens, I portray how the meta-dimension of the law of human dignity, that is, its transcendental character, is actually practiced in the text of seminal instances of FCC jurisprudence. The lens carved in Chapter One reconciles the abstractness incidental to the transcendental with both abstract universals and concrete particulars encountered in the practice of human dignity language in law, in particular legal texts.[104] The application of the lens to the texts of five seminal instances of FCC jurisprudence in Chapter Two results in actual portrayals of this reconciliation.

The practice of the transcendental aspect of the meaning of the law of human dignity is subject to criticism in German legal scholarship.[105] Critics predominantly premise their argumentation on the controversy that originates in the pluralism of understandings of God and, consequently, of the meta-dimension of human dignity. Specifically, they appear reluctant to accept that practicing the meta-dimension of the law of human dignity need not be limited to connoting either that specific metaphysical foundations, for instance Judeo-Christian monotheism[106], are preferred over others, or that abstract metaphysical standards are applied in concretizing meaning[107] in light of the particulars of lived experience. I present two of possible shortcomings following from such lines of criticism. In doing so, I aim to refine the delineation of the presently furthered thesis and to explain how my approach forms an alternative that essentially deviates from the aforementioned pitfalls of investing in the meta-dimension of the law of human dignity to interpret and understand its practice.

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[104] An important point to be kept in mind for the purpose of refining the objective of my study is that abstractness can be associated with both the transcendental and the universal. The linguistic-analytical account of the law of human dignity in Chapter One portrays the spatial rendering of the transcendental vis-à-vis the universal and clarifies the distinction between the two aspects of meaning.

[105] See Nettesheim, 'Die Garantie der Menschenwürde zwischen metaphysicher Überhöhung und bloßem Abwägungstopos' (2005) 130 *AöR* 71

[106] See Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 6

[107] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 19

The first shortcoming of portraying how the meta-dimension of the law of human dignity is practiced concerns the danger of a clash between competing understandings of human dignity in a multicultural and, in particular, religiously heterogeneous society.[108] What is more, epiphanies found in natural law doctrine[109] are in tension with an open, pluralistic legal and social order, traditionally safeguarded by positivism and marked by traits such as the impersonal, the neutral, the foreseeable: metaphysical assumptions and theological references as aspects of human dignity meaning cannot be resorted to for the concretization of the constitutional guarantee of human dignity. Rather, if one wants to attribute ideological neutrality to the Basic Law, one needs to resist particular metaphysical interpretations.[110]

What if, instead of emphasizing conceivable diverse concretizations in a pluralistic legal and social order and identifying the picture of ideological neutrality as a remedy for the danger of clashing conceptions, we associated the transcendental character of the law of human dignity, that is, its meta-dimension, with 'something missing'? If the law of human dignity is empty, then how is it empty, and how can we interpret and understand the textual practice of that law as an affirmative stance towards 'something missing'? In short, listening and learning from lived experience affirms that there is no neutrality in the practice of law[111], and this contradicts insistence on neutrality asserted by voices in legal scholarship[112]. In practicing the law of human dignity, a concrete particular *Menschenbild* is put forward. The mobilization of human dignity thus renders a concrete human image present within the realm of law and at once indicates 'something missing'; 'something missing'

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[108] ibid

[109] Erhard Denninger, 'Die Wirksamkeit der Menschenrechte in der deutschen Verfassungsrechtsprechung – Zur Geltung der Menschenrechte jenseits von Naturrecht und Positivismus' (1998) *JZ* 1129, 1130f.

[110] Nettesheim (2005) 71

[111] Susanne Baer, *Rechtssoziologie – Eine Einführung in die interdisziplinäre Rechtrsforschung* (Baden-Baden: Nomos, 2011) 147 [Law is a source of power and at the same time a technique of legitimizing that power and concealing it under this veil of legitimacy.]

[112] Badura (1964) *JZ* 337, 340 ['Es ist zwar stets möglich, Rechtssätze unter dem Blickwinkel einer bestimmten Vorstellung vom Menschen zu betrachten, doch können sich aus diesem rechtssoziologischen und rechtsphilosophischen Ansatz nicht ohne weiteres Aussagen über Rechtsfolgen ergeben. Demgegenüber besitzt das weitere Argument, daß die personale Anthropologie und die materiale Wertethik in dem Forum, in welchem über ihre Stichhaltigkeit zu entscheiden ist, nähmlich im Forum der Philosophie, starken Einwänden ausgesetzt sind, nur zweiten Rang. Immerhin aber wird dadurch insofern das Augenmerk auf die notwendige Unterscheidung von Sätzen der Ethik und des Rechts gelenkt als die rechtliche Geltung und die rechtliche Bedeutung des Art. 1 I GG nicht mit dem Schicksal einer bestimmten philosophischen Lehre verknüpft sein können.']

corresponds to an empty space reserved for the part of those who have no part as articulated by Rancière. In practicing the law of human dignity this empty space is filled with a concrete and particular *Menschenbild*. How 'something missing' within the realm of law relates to the transcendental will be discussed extensively *infra*; for now it suffices to rethink the claim to neutrality in light of these reflections. Could pledging to opt for neutrality be understood as an expression of the commitment of the *pouvoir constituent* to leave space within the realm of law for the manifestation of concrete particular human images composing a pluralist reality?

The second shortcoming of inquiring into the meta-dimension of the law of human dignity by resorting to philosophical grounds is related to the epistemological implications of the postulate that justification for the inclusion of supra-positive standards into the normative heritage [*zum normativen Erbe*][113] of humanity must be sought in the history of ideas[114]. Such grounds for reluctance towards metaphysical interpretations presume that practicing the supra-positive law of human dignity must mean employing metaphysical standards for its concretization.[115] German philosopher Norbert Hoerster appears disinclined to associate the meaning of human dignity as capability to self-determination in freedom with metaphysical indeterminism.[116] According to German public law scholar Nettesheim, this could lead to the substitution of legal method for a doctrine introducing a meta-legal epiphany[117]. Another legal scholar, Hydrogen, argues that resisting references to transcendence is more attuned an epistemological stance towards the constitutional meaning of the law of human dignity than drawing concrete instructions for practicing that law from a particular metaphysical order and, as a result, producing unsound judgments.[118] However, scholarly disinclination within the discipline of law to refer to transcendence [*Transzendenzbezug*] as in the European history of ideas and in modern ethical approaches to human dignity[119] is not necessarily in accordance with actual instances of practice of the transcendental aspect of the law of human dignity, and

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[113] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 19
[114] ibid
[115] ibid
[116] Hoerster (1983) 93, 96 fn 17
[117] See Nettesheim (2005) 71
[118] Herdegen (n 107)
[119] Herdegen ibid; Ludger Honnefelder, 'Menschenwürde und Transzendenzbezug' (2009) 57 *DZPhil* 273, 273ff.; ibid 273, 276ff., 283ff. [Thomas von Aquin understood the personal claim to respect for dignity to be grounded in anthropological foundational assumptions and to be associated with the vulnerability of human beings.]

certainly does not foreclose other associations between the supra-positive and concrete particulars. To wit, adopting an affirmative stance towards the transcendental as 'something missing' in practicing that law effectively guarantees human beings the space that belongs to them by virtue of being human within the realm of law.

Three further reflections refine the point put forward here as a response to this line of criticism: First, the project of portraying the meta-dimension of the law of human dignity as 'something missing' employs ontological, linguistic-analytical and phenomenological philosophical insights as foundations. These are derived from sources that are not bracketed as moments in the long course of human dignity in the history of ideas sketched out in German and Anglo-American legal literature. Be that as it may, this should not be misunderstood as a challenge to the commonly documented philosophical background or the value of drawing supra-positive standards therefromth. Rather, this hermeneutic and literary approach to the practice of the law of human dignity opposes the arbitrary assertion that supra-positive standards are to be sought only there.

Second, three philosophically grounded accounts of the transcendental character of the law of human dignity are established in Chapter One; I tell three stories of 'something missing'. These stories are merely three conceivable approaches to the transcendental. Their distinct significance lies, first, in that they decisively depart from approaches tailoring the meaning of the legal guarantee to the assumptions of a specific metaphysical order. The three accounts proposed on the contrary allow for pluralism of understandings of the transcendental and of portrayals of its imprint on universals and particulars in the practice of the law of human dignity. Redundancy theoretical approaches[120] bespeak perhaps a niche in the discourse about the meaning of the law of human dignity and can thus be regarded as an appropriate point of departure for reasoning an affirmative stance towards 'something missing'. That said, the three stories of 'something missing' are not to be perceived as stories of redundancy. Rather, 'something missing' is found to be an essential aspect of human dignity meaning of exceptional value to the practice of law, precisely because it is presupposed by the humane practice of law.

Third, an important underlying proposition to the presently initiated argument is that the mobilization of meta-standards in the practice of the law of human dignity

[120] Wihl, 'Wahre Würde' (2012) 187, 197f.

need not call into question the indispensability of doctrinal formulations in applying that law to concrete cases. The former deepen our understanding and cultivate our consciousness of what cannot be grasped, totalized, exhaustively determined, and put into words once and for all. The latter are indispensible for the consistent and coherent applicability of the legal guarantee as they reversely render aspects of human dignity meaning graspable within the realm of law.

Positivist doctrinal approaches establish totalities that set many things straight; at the same time totality traits alone cannot portray the transcendental character of the law of human dignity as practiced in legal texts. Resting our case on the portrayal of that law as a totality structure suspends inquiry into pressing questions. Is human dignity practiced only when enforced in comprehensive arguments, or even when it merely, yet consciously, appears as language in legal texts? How does the practice, namely respect and protection, of the dual sense of 'something missing' as an account of the meta-meaning of the law of human dignity guarantee law's humanism, while recognizing the importance of law's pragmatism?

> What human dignity is constitutes a problem, because it is not obvious, even though or perhaps precisely because, it might seem so initially. The problem of identifying exactly what human dignity is, is a problem that underlies the related problem of insuring that human dignity is recognized.[121]

Ultimately, philosophical grounds are called for. Then, legal science can follow, at least, two conceivable courses of action[122]. The one would be to refine our doctrinal tools, for instance to invest in constructive disagreement with a view to clarifying the law and the legal doctrine already existent. The other would be to turn our sights tenaciously to the language and the concept itself for answers, and 'listen' to human dignity language and phrasal context. This constitutes admittedly a hermeneutic and literary approach to law. The two paths sometimes run parallel to each other and sometimes coincide. For instance, recognizing the absoluteness of the guarantee of human dignity, or granting it the legal character of a fundamental right equally ensue from 'listening' to the notion's meaning, in particular meaning as significance. Significance is context-sensitive and admits of various understandings,

[121] Mette Lebech, On the Problem of Human Dignity – A Hermeneutical and Phenomenological Investigation (Würzburg: Königshausen & Neumann GmbH, 2009) 17

[122] Far from questioning the value of either one of these alternatives, as demonstrated in Chapter One, bouncing to and fro guarantees an informed, and humane, practice of the law of human dignity.

as for instance, varying interpretations of human dignity in Art. 1 sec. 1 GG in light of National Socialism and the atrocities of the World War II demonstrate.[123]

Reflection on the empirically observed ambiguity and controversy re the practice of human dignity in legal arguments is evident in legal scholarship[124]. Ambiguity and controversy can be understood as 'something missing'; if meaning denotes both signification and significance or value, then 'something missing' can refer to ellipsis in both senses. Principally, a distinction is drawn between first, 'something missing' by analogy to Wolfgang Isere's *Leerstelle* concept in literary theory[125] and, second, 'something always missing' signifying the transcendental character or the meta-dimension of law.

The first sense refers to a gap in meaning, which incites turning to other text segments, that is, transposed to the practice of human dignity in law, turning to context. The presumption of emptiness of human dignity in redundancy theoretical approaches[126] inspires the perception of the concept as a *Leerstelle* and can be hermeneutically associated with legal actors' efforts to scout for other textual-contextual and empirical data in interpreting, understanding and availing themselves

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[123] See Neuman, 'On Fascist Honour and Human Dignity: A sceptical response' (2003) 267 [deviation from the time-honored association of the constitutional guarantee of human dignity with the National Socialist German past]

[124] Ambiguity and controversy as indications of 'something missing' are empirical observations re, first, the argumentation developed by legal scholars, who, seen from a hypothetical higher point of view, indeed seem to be talking past each other; second, re positive law manifestations of human dignity across cultures and levels of constitutionalism; third, re the judicial practice of human dignity, particularly as pictured in legal scholarship. See also Hoerster (1983) 93, 93; McCrudden (2008) 655 [emphasis on judicial interpretation]; Spellbrink (2011) 661, 662 [the semantic content of Art. 1 GG is indeterminate and open]

[125] Wolfgang Iser, *Der Akt des Lesens: Theorie ästhetischer Wirkung* (4th edn, München: Fink, 1994) 238-39 ['Thema und Signifikanz sind folglich nur Konstituenten der Vorstellung. Ein Thema bildet sich für die Vorstellung über die vom problematisierten Wissen des Repertoires erzeugte Aufmerksamkeit. Die Signifikanz des Themas bildet sich für die Vorstellung aus der Leerstelle des Themas, die dadurch entsteht, daß das Thema nicht Selbstzweck, sondern Zeichen für das in ihm noch nicht Gegebene ist. So produziert die Vorstellung ein imaginäres Objekt, in dem das zur Erscheinung gelangt, was der formulierte Text verschweigt. Doch das Verschwiegene entsteht aus dem Gesagten; deshalb muß das Gesagte so modalisiert sein, daß das Verschwiegeene vorstellbar wird.']; ibid 284 ['Ergeben sich Leerstellen aus den Unbestimmtheitsbeträgen des Textes, so sollte man sie wohl Unbestimmtheitsstellen nennen, wie es Ingarden getan hatte. Leerstellen indes bezeichnen weniger eine Bestimmungslücke des intentionalen Gegenstandes bzw. der schematisierten Ansichten als vielmehr die Besetzbarkeit einer bestimmten Systemstelle im Text durch die Vorstellung des Lesers. Statt einer Komplettierungsnotwendigkeit zeigen sie eine Kombinationsnotwendigkeit an. […] Durch sie ist die im Text ausgesparte Anschließbarkeit seiner Segmente signalisiert.']; ibid 302 ['Leerstellen sind als ausgesparte Anschließbarkeit der Textsegmente zugleich die Bedingungen ihrer Beziehbarkeit. Als solche indes dürfen sie keinen bestimmten Inhalt haben; denn sie vermögen die geforderte Verbinbarkeit der Textsegmente nur anzuzeigen, nicht aber selbst vorzunehmen. […] Immer dort, wo Textsegmente unvermittelt aneinander stoßen, sitzen Leerstellen, die die erwartbare Geordnetheit des Textes unterbrechen.']

[126] Wihl, 'Wahre Würde' (2012) 187, 197f.

of human dignity as a legal concept. 'Something missing' as a *Leerstelle* constitutes a hermeneutic and literary tool for portraying the tension between universals and particulars[127], which, from a skeptical and rhetorical perspective, features as *circulus in probando* argumentation, namely as a circular movement from the particular to the universal and, again, to the particular[128] from which there is no escape.

Another concept of special pertinence to 'something missing' is the empty signifier in the thought of political theorist Ernesto Laclau. The empty signifier is 'incarnating the moment of universality'[129], and stands for 'a signifier without a signified'[130]. 'Something missing' is to be understood by analogy not only with the 'empty' but also with the 'floating' signifier[131] in the thought of Laclau, because 'something' in 'something missing' points to the 'overdetermination or […] underdetermination'[132] that prevents fully fixing the meaning of human dignity, that is, alludes to ambiguity[133] rather than emptiness.

> […] if the universal results from a constitutive split in which the negation of a particular identity transforms this identity in the symbol of identity and fullness as such, in that case, we have to conclude that: (1) the universal has no content of its own, but is an absent fullness or, rather, the signifier of fullness as such, of the very idea of fullness; (2) the universal can only emerge out of the particular, because it is only the negation of a *particular* content that transforms that content in the symbol of a universality transcending it; (3) since, however, the universal – taken by itself –

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[127] Ernesto Laclau, *Emancipation(s)* (London, New York: Verso, 1996) 13 ['[…] conceiving the relationship between universalism and particularism which differs from both an incarnation of one in the other and the cancellation of their difference and which, in fact, creates the possibility of new discourses of liberation.']; ibid 14 ['the relation between particularity and universality is an essentially unstable and unpredictable one.']

[128] Mary Mills Patrick, *Sextus Empiricus and Greek Sextus Empiricus and Greek Scepticism* (accompanied by a Translation from the Greek of the First Book of the 'Pyrrhonic Sketches' by Sextus Empiricus, Cambridge: Deighton Bell& Co.; London: George Bell & Sons, 1899; Project Gutenberg EBook 17556, release date: January 20, 2006) 55 [The fifth of the five Tropes, the *circulus in probando*, 'arises when that which should be the proof needs to be sustained by the thing to be proved.']; ibid 46 f. ['[…] no one is free from the influence of all conditions of body and mind, so that he can be unbiassed to judge his ideas, and no criterion can be established that can be shown to be true, but on the contrary, whatever course is pursued on the subject, both the criterion and the proof will be thrown into the circulus in probando, for the truth of each rests on the other.' In critically reflecting on coherence theories on human dignity, Wihl touches on the distinction between a criterion and a definition of truth encountered in grounding approaches in this theoretical strand. See Wihl, 'Wahre Würde' (2012) 187, 195 f.]; See also Sextus Empiricus, *Pyrrhonic Sketches [Πυρρώνειες Υποτυπώσεις]. First Book (164-186, 209-241), Second Book (1-133*) (with a Commentary by Tereza Pentzopoulou-Valala tr, *Hellenistic Philosophy, The Sceptics: Arkesilaos, Karenadis, Filon, Antiohos, Stylianos Dimopoulos*, Thessaloniki: Zetros [Ζήτρος], 2007) 546ff.

[129] Laclau (n 127) 55

[130] ibid 36

[131] ibid

[132] ibid

[133] ibid

> is an empty signifier, *what* particular content is going to symbolize the latter is something which cannot be determined either by an analysis of the particular in itself or of the universal. The relation between the two depends on the context of the antagonism and it is, in the strict sense of the term, a hegemonic operation.[134]

The negation of a particular content generates the symbolic, 'the symbol of a universality transcending it'[135], an *ideatum* that surpasses the idea[136]. In Ludwig Wittgenstein's *Tractates Logico-Philosophicus* the symbolic is associated with tautology[137]. In tautology 'the conditions of agreement with the world […] cancel one another, so that it stands in no presenting relation to reality' and it 'leaves to reality the whole infinite logical space […]'[138]. Starting, perhaps, to fathom the links between the inviolability of human dignity in the Basic law, tautological schemata and symbolical meaning, one becomes aware of how an affirmative stance towards 'something missing', a notion analogous to the empty and floating signifiers, carries the promise of relinquishing the exceptional hermeneutic and literary potential of human dignity language in law. Laclau also indicates the nature of the tension between the universal and a particular: antagonism, 'a hegemonic operation'[139], a process that leads one particular to reign over others in representing the universal, a *polemos* as per the Presocratic philosopher Heraclitus. The process and outcome are essentially highly dependent on context. Laclau stresses, 'only if the signifiers empty themselves of their attachment to particular signifieds and assume the role of representing the pure being of the system – or, rather, the system as pure Being – […] [is] such a signification […] possible.'[140]

The second sense of something escaping our grasp, which constitutes the mainspring of this thesis, is framed as 'something always missing'. The treatment of the universals-particulars tension *supra* apropos 'something missing' set the stage for

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[134] ibid 14 f.
[135] ibid
[136] For the purpose of avoiding confusion it is vital to distinguish between 'universals' as used in the present analysis and Laclau's 'symbol of a universality'. Universals are not identified with the transcendental in my argument. The 'symbol of a universality', however, in the thought of Laclau indeed evokes the idea of infinity. According to Levinas, what is exceptional about the idea of infinity is that 'its *ideatum* surpasses the idea', in Levinas, *Totality and Infinity*, 49; ibid 289 ['[…] the idea of infinity, the presence in a container of a content exceeding its capacity […]']; See also Günter Frankenberg, 'Constitution-Building In Times Of Transition' (2001) 4 *Politička Misao* 103 [Constitutions *per se* are instruments and symbols; the instrumental nature can be associated with law's pragmatism, while the symbolic is indicative of representatation, understood as a literary term.]
[137] See *infra,* Chapter One, B
[138] Wittgenstein, *Tractatus,* (4.462); ibid (4.463)
[139] Laclau (n 127) 43 ['The presence of empty signifiers […] is the very condition of hegemony.']
[140] ibid 39

associating 'something always missing', the transcendental, with the infinite rather than the universal. Framing thus the meta-dimension of the law of human dignity, I emphasize the difference between the *modus operandi* of the tension between universals and particulars in practicing that law, a circular process and 'something always missing', the transcendental that breaches the circle. The transcendental, what cannot be 'said' but only 'shown', borrowing language from Wittgenstein's *Tractates*, is practiced distinctly when the law of human dignity is mobilized in legal texts.

With respect to 'something always missing' all that can be 'shown' is a demarcating line, namely the limit between what is there, and something consistently missing. Discussing the limit, what cannot be 'said' but only 'shown', allows for that which can neither be 'said' nor 'shown' to be understood by revealing the shape of its shadow. The shadow metaphor hints at the nothingness (lack of light) corresponding to the shadow of a given object, which is representational of the object's shape, in other words, limits. If the notion of the limit is incorporated into the meaning of human dignity as practiced in law, then this meta-conceptualization of human dignity stands on the borderline between content and form, signification and significance; as regards the meta-dimension of human dignity, all human beings can sense is their absolute separation from 'something always missing'.

The point of departure for telling a story of 'something missing', namely the empirical observation of ambiguity and controversy re the practice of human dignity[141] as a legal concept, cannot provide a sound justificatory basis for the dual sense of 'something missing'. Be that as it may, it constitutes *de facto* grounds for the probability[142] of 'something missing' and the reasonableness of scrutinizing this proposition as an articulation of what forms an integral aspect of human dignity in the

[141] Arthur Schopenhauer's critique of the human dignity proposition as understood from a Kantian viewpoint, namely the thesis that human beings should be treated as ends rather than means to end, centers on the highly vague, indeterminate character of the concept, which renders it insufficient and elliptical [*wenigsagend*] unless concretized. Schopenhauer stresses the need for explanation, definition and modification of human dignity meaning as a prerequisite for any sort of practice. As in Hoerster (1983) 93

[142] Cf. Wittgenstein, *Tractatus,* (5.155) ['The unit of the probability proposition is: The circumstances – with which I am not further acquainted – give to the occurrence of a definite event such and such a degree of probability.']; ibid (5.156) ['Probability is a generalization. It involves a general description of a propositional form. Only in default of certainty do we need probability. If we are not completely acquainted with a fact, but know *something* about its form. (A proposition can, indeed, be an incomplete picture of a certain state of affairs, but it is always *a* complete picture.) The probability proposition is, as it were, an extract from other propositions.']

most profound sense.[143] To be sure, the ambiguity and controversy traced in the legal discourse can only serve as a starting point to a story of 'something missing.' *De facto* grounds point to the reasonableness of engaging in further research**.**

A story of 'something missing' could be viewed as a contribution to non-definition[144] or negative determination[145] approaches as conceivable remedies to the necessity of value decisions in practicing the law of human dignity. Minimalist approaches reflect an effort to assert the intersubjective basis of moral legitimacy. 'Black box'[146], '*leerformelhaft*'[147], or 'smokescreen'[148] contentions, or, as Wahl puts it, redundancy theories[149]**,** are not extensively problematized in legal literature. The dual sense of 'something missing', I argue, does not merely descriptively denote missing parts of human images and lacunas in the practice of the law of human dignity; more importantly, it serves an analytical function reinforced by the empirical observation of the elliptical character of human dignity manifestations in legal texts.[150] To be more specific, the present approach is – in postmodern fashion[151] – a

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[143] The claim that a genuinely inherent to the concept of human dignity quality can be articulated, and, what is more, that this quality could be trailed in the practice of the concept in legal texts must be subject to critical reflection. According to Popper, some theory is always implied even in the simplest of sentences. Since acceptance of 'basic statements' as valid is necessarily mediated by a given – unavoidably subjectively selected – theoretical approach, the claim that I unveil an integral to human dignity language feature is not absolutely uncontestable and fixed, precisely due to its definitional nature. 'Basic statements', due to the 'universal names' that stand for their meaning, are essentially always hypotheses, which could be verified or falsified. Only the systematic and sound justification of the sources and steps of interpretation can outweigh the risks of a hermeneutical and definitional project. See Karl Popper, *The Logic of Scientific Discovery* (first published in Vienna: Verlag von Julius Springer, 1935; London, New York: Routledge Classics, 1968) 94-95; ibid 104ff. [Acceptance of 'basic statements' depends necessarily on an underlying agreement that renders further discourse possible.]

[144] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 51; See also para 51 fn 159 [Theodor Heuß's 'nicht interpretierte These']

[145] See Badura (1964) *JZ* 337; Dreier ibid para 51

[146] Baer, 'Triangle' (2009) University of Toronto Law Journal 417, 420

[147] Hoerster (1983) 93, 96

[148] McCrudden (2008) 655, 722

[149] Wihl, 'Wahre Würde' (2012) 187, 197f.

[150] Hoerster (n 147) [Hoerster notes the elliptical [*leerformelhaft*] character of the principle of human dignity in the legal reality ['*in unserer Rechtswirklichkeit*'] of practice in Germany.]

[151] I presently use the term in light of Butler's reflections and understanding in Judith Butler, 'Contingent foundations: feminism and the question of postmodernism', in ibid, *Feminists theorize the political* (New York, London: Routledge, 1992) 3, 6f. ['I don't know about the term "postmodern," but if there is a point, and a fine point, to what I perhaps better understand as poststructuralism, it is that power pervades the very conceptual apparatus that seeks to negotiate its terms, including the subject position of the critic; and further, that this implication of the terms of criticism in the field of power is *not* the advent of a nihilistic relativism incapable of furnishing norms, but, rather, the very precondition of a politically engaged critique. To establish a set of norms that are beyond power or force is itself a powerful and forceful conceptual practice that sublimates, disguises and extends its own power play through recourse to tropes of normative universality.']; ibid 15 ['To deconstruct is not to negate or to dismiss, but to call into question and perhaps most importantly, to open up a term, like the subject, to a reusage or redeployment that previously has not been authorized.']; Cf. MacKinnon's line of criticism,

Trojan Horse within the walls of negative significations and polemic 'emptiness' talk[152] and an affirmative stance towards 'something missing'[153], enkindling neglected questions in the legal discourse, such as: Why does the legal concept of human dignity appear 'empty'? Or, how is it 'empty'? Why and how is it a 'black box'? How do manifestations of the concept appear abstract as universals and concrete as particulars?

Intending to elucidate the meaning of the law of human dignity, the present analysis considers the transcendental character of human dignity and law's *Menschenbild,* and anchors the relevance and merit of the three philosophical accounts offered in Chapter One to their hermeneutic value as tools for advancing another understanding of language that features dominantly in legal texts, drawing specifically on positive law, case law and legal literature. Though evidently pertinent to the metaphysical and transcendental[154] aspects of the law of human dignity, the argument considerably departs from the abstraction of metaphysical approaches[155].

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reacting particularly to how postmodernism does not pay justice to feminist theory and method, MacKinnon, *Are Women Human?* (2006) 49 [Granted, what postmodernism involves is elusive. 'Postmodernism is a flag flown by a diverse congeries, mostly because lack of unity is their credo and they feel no need to be consistent.' According to MacKinnon this 'trend in theory' targets on reality. 'Postmodernism, I will argue – or more narrowly, the central epistemic tendency in it that I am focusing on – derealizes social reality by ignoring it, by refusing to be accountable to it, and, in a somewhat new move, by openly repudiating any connection with "it" by claiming "it" is not there.']; ibid 54 ['Postmodernism as practiced often comes across as style – petulant, joy-riding, more posture than position. But it has a method, making meta-physics far from dead. Its approach and its position, its posture toward the world and tis view of what is real, is that it's all mental. Postmodernism imagines that society happens in your head. Back in the modern period, this position was called idealism.']; ibid 63 ['Their critically minded students are taught that nothing is real […] that reality is a text (reading is safer than acting any day), that creative misreading is resistance (you feel so radical and comfortably marginal), that nothing can be changed (you can only amuse yourself).'].

[152] Hoerster for instance frames emptiness as an aspect of the problem of necessary value decisions in practicing the law of human dignity. The principle of human dignity is rendered a *Leerformel*, an empty formula, when decisions are taken on which forms of human self-determination correspond to the 'morally legitimate', in lack of intersubjectively accepted criteria. Be that as it may, Hoerster clarifies that a legal concept is not a *Leerforel* simply because of the controversy involved in practicing it in certain cases, in Hoerster (1983) 93, 95

[153] Wihl, 'Wahre Würde' (2012) 187, 198 [The affirmative stance towards the dual sense of 'something missing' is at once an account of how the *'Ebenenverwechslung'* noted in Wihl's account of the redundancy theory operates in the practice of the law of human dignity particularly in instances in FCC jurisprudence.]

[154] The analysis is premised on the distinction between the meta-dimension of human dignity and the transcendental; the latter intimates a movement, namely the traversal of a limit towards the meta-level, involves critical reflection, and underlines the processual dimension of the practice of the law of human dignity and the possibility of ascendence to an understanding of the concept's meaning. See, in a similar direction, Stöcker's critique of the *Leerformel* in Hans A. Stöcker, 'Menschliche Würde und kritische Jurisprudenz – Zur utilitarischen Auslegung des Art. 1 I GG' (1968) *JZ* 685, 686 ['[...] Rechtsagnostizismus […] macht die Jurisprudenz zu einer Farbenlehre für Blinde, womit der Gipfel, auf dem sich die menschliche Würde entfaltet, mit Sicherheit ebenfalls nicht erklommen wäre.']

[155] At the same time this approach departs from inquiry into sociological aspects of the law of human dignity. See Stöcker (n 154) 685

Methodologically, this approach resists both raw empiricism and metaphysical obscurity[156], seeking, rather, to construe and apply a model through which we can abstract from particulars only to understand them anew.[157] Language is a foundational theme in all three accounts as well as the centerline of the methodological approach in both Chapter One and Chapter Two. Once the construction of the multilayered model is completed one understands language as lived experience.[158]

Where does this approach stand vis-à-vis the scholarly quest for determination of human dignity as a legal concept? There are obviously good reasons why jurists concentrate their efforts on rendering the practice of human dignity workable – even more, universally[159] workable – by pursuing the establishment of a universal minimum core, or a harmonized system and process of constitutional interpretation. However, such approaches are only partially satisfying, as the scope of the research question does not necessarily trigger critical reflection. Minding that a particular can be methodically tackled, framed, and, ultimately, doctrinally baptized a workable universal, could positivist approaches[160] or rigidly applied legal doctrine go so far as to translate such workability into a perception of the constitutional guarantee that effectively totalizes all other particulars arising in practice? Totality signifies the perception of the world; the world is included, in its entirety, within the boundaries of our vision. Since all we assume we need to see and know is gathered right before our eyes, totality structures advance law's – *strict sense* – workability. Certainty, uniformity and foreseeability of outcomes in the practice of the law of human dignity could be bracketed as totality traits in view of phenomenological insights elaborated on in Chapter One.

Practicing the law is associated with pragmatic considerations, as it constitutes an outcome-oriented process that entails – to varying extents, depending on the

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[156] ibid 686

[157] Stöcker, ibid 686; The present argument initiates a linguistic-analytical discourse with the intention of guaranteeing clear and meaningful speech and, consequently, meaningful practice of human dignity language in law. See Alexy, *A Theory of Legal Argumentation* (1989) 191

[158] Levinas, *Totality and Infinity,* 12 [Introduction by John Wild]

[159] Admittedly, a universally attuned, workable system of judicial interpretation founded on a universal consensus on the content or the form, the substance or the function, or, holistically, the meaning of human dignity seems to be a utopia. At the level of constitutional courts' jurisprudence, judicial interpretation seems more workable, despite the concept's relative abstractness and indeterminacy. The criticism of conceptual ambiguity and controversy in constitutional courts' practice is, at times, inflated. See McCrudden (2008) 655, 712 f.; Cf. Carozza (2008) 931; See Neomi Rao, 'On the Use and Abuse of Dignity in Constitutional Law' (2008) 14 *Columbia Journal of European Law* 201; Habermas, 'The Concept of Human Dignity' (2010) 464

[160] Erhard Denninger, 'Über das Verhältnis von Menschenrechten zum positiven Recht' (1982) *JZ* 225

methodological disposition of legal actors towards lived experience – a constant confrontation with reality.[161] In practicing the law of human dignity legal actors produce meaning[162]. As noted *supra*, totalities render parameters taken into account in the practice of law surveyable, hence also manageable, and are presupposed by sound justification of decisions in accordance with requirements of due process and equality before the law. The point of concern, however, is not whether or how totalities are necessary and useful in the practice of law, but rather whether they amount to adequate portrayals of such practice, in view of the foundational character of the law of human dignity in the order of the Basic Law or any order that adheres to the guarantee and aspiration of humanism.

The succeeding analysis demonstrates that developing a totality view of the practice of human dignity in law, constitutes just one of two parallel stories. The totality story allows for grasping the multi-dimensionality of human dignity meaning through a broadening of our vision's horizons, for instance through comparative juxtaposition, contextualization, or inter- and transdisciplinary reflection. Turning to the context of a *Leerstelle* within the boundaries of a totality in quest for meaning affords sociological, historical, theological[163], cultural and legal findings. At variance with what can be found within a totality structure, the transcendental tightly linked with ethics and aesthetics, the Good and the Beautiful, denotes a movement towards

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[161] Gadamer, *Truth and Method* (1975, 2004) 316 ['The law is always deficient, not because it is imperfect in itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law.']

[162] See Binder & Weisberg, *Literary Criticism of Law* (2000) 153 ['[…] meaning is simply whatever interpreters seek. […] Interpreters may seek to identify an author's intent, a text's verbal meaning, or the response of some group of readers. Any of these becomes the meaning of the text insofar as an interpreter seeks it. That meaning is reducible to the practice of interpreters is a 'theory' of meaning with no implications for that practice. Hence, neither lawyers nor literary critics can learn how to interpret by achieving a correct philosophical account of meaning. From this it follows that legal and literary interpretation are not necessarily alike. If there are reasons for lawyers and critics to interpret in similar ways, they do not arise from the nature of meaning or the nature of language.']; ibid 189 ['[…] meaning consists in the world of purposes, projects, and possibilities discernible to participants in a given context – the 'horizon' disclosed by a particular vantage point. The Gadamerian interpreter first seeks to reconstruct the horizon within which the text was written, and then asks how and how much her own horizon coincides with that of the text. […] text and interpreter participate in a dialogue or hermeneutic circle.']; See also Sanford Levinson, 'Law as Literature' in Sanford Levinson & Steven Mailloux (eds), *Interpreting Law and Literature: A Hermeneutic Reader* (Evanston, Illinois: Northwestern University Press, 1988) 161 [Commenting on the views of Stanley Fish, Levinson observes: 'Meaning is created rather than discovered, though the source of creative energy is the particular community within which one finds him- or herself.']

[163] Rev. John J. Coughlin O.F.M., 'Pope John Paul II and the Dignity of the Human Being' (2003-2004) 27(1) *Harvard Journal of Law and Public Policy* 65; John D' Arcy May, 'Human Dignity, Human Rights and Religious Pluralism: Buddhist and Christian Perspectives' (2006) 26 *Buddhist-Christian Studies* 51

'something always missing' and the breach of law's totality, namely an opening towards infinity.

B. Premises, research question, central thesis

A deft start requires setting forth premises to research questions and the thesis. These are summarized here, to be further analyzed where necessary *infra*.

First, 'practice' refers to the mobilization of human dignity language in legal texts[164]; granted, legal texts can reflect just an aspect of practice.[165] Mobilizing law means setting law in action, practicing law. At the same time, 'practice' denotes, for present purposes, the production of meaning by individuals professionally practicing the law, stereotypically designated in German with the masculine '*die Juristen*', the jurists.[166] Consciousness, awareness, and knowledge of the law are subjective factors influencing the meaning produced.[167] Attention is focused predominantly on texts of German constitutional law and FCC jurisprudence, as well as international law treaties, European Union law, constitutions, and other constitutional courts' jurisprudence. The context of practice cannot be cast aside; it is yet another source of human dignity meaning. The emphasis on illustrative instances of practice of the law

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[164] Erhard Blankenburg, *Mobilisierung Des Rechts: Eine Einführung in Die Rechtssoziologie* (Springer-Verlag, 1995) 26ff.; ibid 35ff.; Baer, *Rechtssoziologie* (2011) 209 [Mobilization refers to the use [*Nutzung*], the practice of law, while validity (being in force) or impact refer to the consequences of law, the effects. Whether law becomes law 'in action' depends both on subjective and objective factors. The critical question is why actors follow specific rules. This is a highly complicated issue from a sociological point of view, because individuals, also individuals within institutions, are driven by 'bundles of motives' [*Motivbündeln*], which are not necessarily accessible to systematic assessment.]; ibid 212ff. [What one can do is identify certain formative subjective factors of mobilization, such as legal consciousness [*Rechtsbewusstsein*], knowledge of the law [*Rechtskenntnis*] and *Anspruchswissen*, namely the subjective claim that one has enforceable rights, that one is able to claim a right, which requires self-mobilization. Self-mobilization is at the same time a process of becoming a subject. *Anspruchswissen* should not be confused with *Anspruchshaltung,* namely a sense of entitlement.]; Showing how practice is broader than legal text, ibid 'Praxen des Verfassungsrechts: Text, Gerichte und Gespräche im Konstitutionalismus' in Michael Bäuerle, Philipp Dann & Astrid Wallrabenstein (eds), *Demokratie-Perspektiven: Festschrift für Brun-Otto Bryde zum 70. Geburtstag* (Tübingen: Mohr Siebeck, 2013) 3 [*Verfassungstextualität;* critical reflection on the proposition that law is text; *Textlücke* are filled, through construction or reconstructions of a historical will, selectively; *Der Text als Interpretationsauftrag*; *Verfassungsgerichtsgesprächpraxis*]

[165] See Clifford Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (3rd edn, New York: Basic Books, 1983) 30 ['Even more than "game" or "drama", "text" is a dangerously unfocused term, and its application to social action, to people's behavior toward other people, involves a thoroughgoing conceptual wrench, a particularly outlandish bit of "seeing-as." Describing human conduct in the analogy of player and counterplayer, or of actor and audience, seems, whatever the pitfalls, rather more natural than describing it in that of writer and reader.']; Baer, 'Triangle' (2009) 417, 446 ['[…] text is not all there is to constitutional law […]']; Baer, *Rechtssoziologie* (2011) 166 [the mobilization of language in the context of judicial proceedings is an example of other aspects of practice, beyond text]

[166] Baer, *Rechtssoziologie* (2011) 209

[167] ibid

of human dignity in FCC jurisprudence necessarily assumes the formative influence of normative and institutional, political, historical, sociological and cultural context on meaning. The realities of legal pluralism[168] and multilevel constitutionalism constitute organic aspects of the portrayal of the practice of law[169] today, prove quintessential determinants of the 'legal' concept's substantive content, and certainly underlie the production of human dignity meaning in judicial practice.[170]

Second, the 'legal' character of the concept, widely affirmed in legal literature and, particularly, in German legal doctrine, is associated here with the empirically assessed event of human dignity language manifestations[171] in legal texts.[172] The 'legal' – at least in the narrow sense[173] – character of human dignity in preambles, in isolated *en passant* references in the jurisprudence of international and constitutional courts[174], or in cases of implicit practice in positive law, for instance in the text of the *European Convention of Human Rights* [ECHR] or constitutional law[175], as in the Canadian example[176], is often vague or contested.[177]

For present purposes, it suffices to stress that practicing the law, irrespective of how we theorize it, entails contouring legal language games, that is, language

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[168] See Sally Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review* 869; Baer (n 166) 88-89

[169] Denninger (1998) *JZ* 1129

[170] See also Shirley van Buiren, Dieter Grimm & Elke Ballerstedt, *Richterliches Handeln und technisches Risiko* (Baden-Baden: Nomos Verlag, 1982); Giuseppe Martinico, 'Multiple loyalties and dual preliminarity: The pains of being a judge in a multilevel legal order' (2012) 10(3) *International Journal of Constitutional Law* 871 [examination of the challenges to the work of the judge raised by the multilevel constitutionalism reality in the example of dual preliminarity]

[171] As inferred from the ontological approach to human dignity as a legal concept *infra*, regardless of whether the concept is enforceable, whenever human dignity language is practiced in legal texts, the inherent quality of 'something missing' has effects that are indispensible to the humane operation of fundamental rights.

[172] Immersing in the discourse on the nature of law, what the law is, exceeds the purposes of the present analysis. Reference to legal positivist, doctrinal and non-mainstream responses to that question will be made where deemed necessary.

[173] Denninger (1982) *JZ* 225; Hans Kelsen, *The Law of the United Nations – A critical analysis of its fundamental problems* (New Jersey, NJ: The Lawbook Exchange, LTD, 2000)

[174] My argument draws on such examples, particularly manifestations in ECtHR case law, for comparative insights.

[175] Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 35 [on ECHR]; ibid 51-56 [on France, Poland, Switzerland, Austria, Israel]

[176] Baer, 'Triangle' (2009) University of Toronto Law Journal 417, 445ff. [the example of Canadian constitutional law]

[177] See Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 57 f. [on Great Britain]; ibid 58 ff. [on the USA]; See also Michael J. Meyer, 'Introduction' in Michael J. Meyer & William A. Parent, eds., *The Constitution of Rights – Human Dignity and American Values* (Ithaca, NY: Cornell University Press, 1992) 1-9

games *sui generis*[178], to wit a particular kind of *logos* that substantiates the production of meaning by legal actors[179]. Drawing the boundaries of legal language games is essential a task to the practice of law and to portraying such practice; an affirmative stance towards the dual sense of 'something missing' defines how these are to be sketched. The argument futhered is that the presence of the law of human dignity within a constitutional order calls for delineating those boundaries not only on the basis of what lies within them, but also mindful of something ungraspable beyond them. Justification for the 'how' and the 'why' of law's practice requires transcending the finite total of the legal language game. In the pages that follow, I demonstrate three accounts of how human dignity language within law guarantees the possibility of transcendence.

Transcendence assumes a meta-level of meaning, namely 'that'[180] there is a meta-level, otherwise any process of justification in practicing fundamental rights and the law of human dignity *per se* becomes self-referential, and the questions of 'how' and 'why' are rendered logically nonsensical. The linguistic-analytical and phenomenological accounts *infra* explore how the production of meaning reflected in legal language games presupposes and is sparked by 'something missing'; how the project of filling 'something missing' *ad hoc* interferes with the boundaries of the legal language game; and how 'something always missing', mirrored in the face of human beings, wherever these are traced in the portrayal of judicial practice, distorts the rigidity of law as a demarcated totality.

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[178] Alexy, *A Theory of Legal Argumentation* (1989) 50 [characterizes moral and legal discourse language games *sui generis*]

[179] 'Meaning' is understood holistically, not only as comprising content and form, substance and function, but, here, additionally, beyond the signification and significance of the uttered statement, as ensued from the texture or tone of language employed. Interpretation occurs within a context, essentially also linguistic context or language perceived, in accordance with Saussure's structural linguistics, as a system of signs expressing ideas; signs are at once the signifier (*signifiant*) and the signified (*signifié*). Saussure further distinguishes between *langue,* the abstract system of language, and *parole,* namely the concrete act of speech in practicing language. These remarks are of pertinence to the portrayal of how the judge practices the law of human dignity in the text of judicial decisions. See Ferdinand de Saussure, *Course in General Linguistics* (Charles Bally ed, Charles Bally, Albert Sechehaye & Albert Riedlinger trs, Peru, Illinois: Open Court Publishing, 1986); Iser's *Leerstelle* concept treats the issue of gaps identified in portraying practice and how they can be filled by recourse to the language already there. In Wolfgang Iser, *Der Akt des Lesens* (1994) 301ff. Consequently, the delineation effectuated when language is practiced as a legal concept influences the overall quality of the language game in various respects. A systematic classification of the range of factors influencing meaning in law is left to those most competent to perform it; the proposition that practicing law entails limiting – not in the sense of reducing, but rather in the sense of taming – language, will suffice for the presently furthered argument.

[180] Wittgenstein, *Tractatus,* (6.44)

Third, the argument springs from the composed nature of the term 'human dignity' [*Menschenwürde*], or 'dignity of the human being' [*die Worde des Mencken*]. Why is this – perhaps banal on the face of it – linguistic observation material to the research question, central thesis and analysis? What could be perceived as banality from a mainstream positivist perspective, presents an intriguing point of departure for a hermeneutic and literary enterprise.

> The English expression 'human dignity' consists of the predicate 'human' and the noun 'dignity'. The adjective qualifies the noun so as to determine the kind of dignity in question as being of the human kind. (The adjective has a similar function in the expression 'human being'. Here it qualifies the noun 'being', to determine the kind of being in question as being of the human kind.) Because of this qualification, the expression cannot function adjectively in English. That is, we cannot say, without doing violence to language, the 'human dignitiness' of someone (or 'human dignifiedness' of someone), anymore than we can say the 'human beingness' of someone[181]. […] this is because we refer, by the expression 'human dignity' to a value we by the expression designate as fundamental. A fundamental value is not essentially a quality; it is essentially fundamental, and thus it does not call for an adjectival use, only a substantive one. 'Human dignity' can function grammatically only as a substantive. Moreover: when 'human' and 'dignity' are used in conjunction they form the expression 'human dignity', which is not simply an equivalent of 'dignity'. 'Dignity' could be predicated of many different species in each their own way, whereas 'human dignity' is reserved to human beings.[182]

[181] In the following analysis, the term 'human being-ness' – hyphenated so as not to conceal 'the violence to language' – is employed to denote a fundamental, rather than adjectival, use that corresponds to the experience of indignity in the world today on the one hand, and important work on framing human rights apropos human capabilities on the other. Since the question 'Are human beings human?' by analogy with MacKinnon's question 'Are women human?' is unfortunately still current in law and life, the term 'human being-ness', despite its arbitrariness, may still stand as reference to the existence, essence, or identity of human beings. Another comparative advantage of using this term is that it connotes various modes of being-ness, such as existence, essence or identity; this enhances the intelligibility and fluency of the analysis, in that it facilitates talking about the diverse modes, without neglecting their differences. Inquiry into each of these manifestations of human being-ness or their distinction exceeds the scope of this meta-approach to the law of human dignity. On the identification of human capabilities see Martha C. Nussbaum, *Frontiers of Justice – Disability, Nationality, Species Membership* (Cambridge, MA & London, England: The Belknap Press of Harvard University Press, 2006); The term 'human being-ness' is employed to enhance the fluency of the present hermeneutic and literary enterprise, and receives a distinct ontological, linguistic-analytical and phenomenological signification in the respective philosophically grounded accounts under Chapter One. References to the *Dasein, Sosein,* existence, essence, and identity are all bracketed with 'human being-ness'. Employing the term 'human being-ness' should not be misunderstood as taking a stance in the doctrinal discussion about whether the bearer of human dignity is the concrete individual human being or abstractly 'being human' [*Menschenwesen*] or humanity [*Menschheit*] as a whole; in line with the dominant opinion in doctrine, the human being is understood in its individuality, yet as part of the community. See also Köhne (2004) 285, 286

[182] Lebech (2009) 21

Underscoring the composed nature of the term sets the stage for zooming in on and reading the 'human being' component first separately, only to then re-read both components in unity. The analysis is premised on the possibility of disentangling the components for the purpose of better scrutinizing each – or, here, mainly the former – and, eventually, of recomposing the term in light of a new, enhanced understanding of its meaning[183]. The ontological, linguistic-analytical, and phenomenological interpretations of 'human dignity' *infra* bring to focus the 'human' or 'human being' component in view of its significance for interpreting the practice of the meta-dimension of human dignity.

Fourth, a link is drawn between the empirical observation of ambiguity and controversy[184] and the complexities integral to the reconciliation of universals in need of concretization with particulars framed as claims to universals. Portrayals of the competence and responsibility of judges[185], as reflected in the text of decisions, to treat such complexities in practicing human dignity language differ significantly from analogous portrayals of actors' competence and responsibility in lawmaking or legal scholarship. In general terms and *e contrario* this distinction is plain to see in that the degree of concretization required, or desired, in lawmaking, differs from how legal scholars treat concrete particulars in producing meaning under less strict institutional and doctrinal constraints. The imprint of particulars on 'something missing' within legal language games is context-specific and the result of reflexivity between (a) law as a lens and human beings and the world looked at through that lens on the one hand, and (b) human beings and the world on the other. The quality of the surface on which

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[183] Butler, *Feminism and the question of postmodernism* (1992) 3, 15 [deconstructing means calling into question]

[184] With regards to the phenomenological account in Chapter One, Part C, setting the empirical observation as the point of departure is aligned with the first prong of the phenomenological triptych in the work of Edmund Husserl and his student Edith Stein, namely empirics; the other two prongs are eidetics, and constitution. See Lebech (2009) 18

[185] Baer, *Rechtssoziologie* (2011) 230f. [Psychology is an important source of insights into how a judgment comes into being. Rational justification is just one side of judicial proceedings and decisions. The judgment depends on a variety of factors. Preconceptions, bias, stereotypes, phobias of different sorts can influence the production of meaning by the judge. Legal sociology stimulates our feelers for identifying such influences on ostensibly rational, objective, neutral decisions and for strictly scrutinizing value judgments where involved. The judge confronting value judgments re fundamental rights conflicts has the responsibility to competently consider and attend to preconceptions. The judge carries the responsibility to self-critically reflect on his or her own *Vorverständnis.* The concept of the *Vorverständnis* surfaced in German legal sociology in the 1970s. The judge should enhance his or her competence, in view of his or her responsibility, to critically reflect on the *Vorverständnis* underlying the practice of the law. For instance, precedent and, more generally, reasoning in previous judicial decisions can be professionally-intuitively examined as to their correctness and soundness. Exercising scrutiny at the level of the *Vorverständnis* can proactively forbid excesses, arbitrariness, manipulation and unsound assumptions.]

something is imprinted is also a determinant of the imprint; institutional setting, political, sociological and cultural factors affect how 'something missing' is filled with concrete, particular meaning.

Could the empirically observed ambiguity and controversy of the practice of human dignity language in law be portrayed and understood by recourse to philosophical insights into human nature, language, or the transcendental, conceived apropos the notion of the limit and 'something missing'? Chapter One effectively responds to this question in the affirmative. Chapter Two illustrates how the introduced portrayal of the practice of the law of human dignity permits another view on the text of seminal instances in the relevant FCC jurisprudence. Ultimately, this enterprise demonstrates the hermeneutic value of philosophical insights, and signals why the proposed interpretation constitutes a desideratum, at least for looking at the German example.

The documentation of ambiguity and controversy and the assertion that these ensue predominantly from the tension between universals and particulars are well-established courses of criticism in legal scholarship; legal scholars problematize the proneness of the concept to arbitrary practice, or even malpractice, in law due to its abstractness and openness. Beyond the tension between universals and particulars, which transpires before our eyes and thus ist non-arbitrary resolution depends on us as actors, as argued here, the assumption 'that'[186] there is a meta-dimension from which actors are separated and towards which transcendence is possible is a vital element of the portrayal of practice. While the aforementioned tension, seen in isolation, reasonably brings to focus interpretive problems linked specifically to 'something missing' in the practice of human language in law, understanding the therefrom ensuing ambiguity and controversy in light of 'something always missing', namely the meta-dimension of law, reveals conversely the interpretive opportunities borne by the presence of human dignity language in law, most importantly the opportunity to practice law humanely and to be constantly vigilant that law is thus practiced. This is the rationale behind adopting an affirmative stance towards the dual sense of 'something missing'.

> […] identifying exactly what human dignity is and why, surfaces when human dignity is dismissed as being merely a quaint religious dogma, a poetic conceit, a rhetorical device or a romantic ideal. It

[186] Wittgenstein, *Tractatus,* (6.44)

> presents itself when human dignity is seen as a convenient legal fiction, a social construction or an ethnocentric belief. In all these cases it is taken for granted that the expression is meaningless, although it has some political and legal use. This again means that the ambition to found human rights on human dignity frequently is accompanied by a modicum of ironic superiority: 'human dignity is for preambles and solemn occasions, but it really doesn't have any specific content or meaning, it means anything you like'.[187]

From the standpoint of a jurist studying how we talk about human dignity, a further type of inflation can be discerned in legal literature, namely argumentative inflation in legal syllogisms composed of bold major premises that fall short of minor premises. Contentions re the proneness of human dignity to 'manipulative' judicial interpretation[188] or 'merely rhetorical'[189] use in legal literature are rarely furnished with concrete examples portraying such practice. Posing questions such as 'how is it abstract?' or 'how is it empty?' can be seen, at the same time, as an implicit criticism of or reaction to the utterance of inflated polemic arguments that lack theoretical explication and demonstration of supporting findings.

The progression from these premises to the central thesis, namely the affirmative stance towards the dual sense of 'something missing' as an inherent characteristic of human dignity language that trails the practice of the concept in law, is mediated by the following research questions: First, how do philosophical – ontological, linguistic-analytical, and phenomenological – insights enhance our understanding of the dual sense of 'something missing' as an aspect of the meaning of the law of human dignity apropos the *Menschenbild* and meta-dimension of law, particularly German constitutional law? How do ontological, linguistic-analytical and

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[187] Lebech (2009) 17

[188] McCrudden (2008) 655, 655; ibid, 710 ['By its very openness and non-specificity, by its manipulability, by its appearance of universality disguising the extent to which cultural context is determining its meaning, dignity has enabled East and West, capitalist and non-capitalist, religious and anti-religious to agree (at least superficially) on a common concept.']

[189] An interpretation of what 'merely rhetorical' signifies, and why it is problematic is found in Binder & Weisberg, *Literary Criticism of Law* (2000) 24 ['[…] the efforts of some liberal rhetoricians to model vague virtues like judiciousness and impartiality, without favoring any particular conception of the good, can produce a hollow shell of rhetoric, principled in tone without particular principles.']; 337 [James Boyd White 'suggests that if we see law […] as a rhetorical practice, we will be less disturbed by textual ambiguity and discretion in the application of law.'] citing White, *Heracle's Bow* (1985); David N. Weisstub, 'Honor, Dignity, and the Framing of Multiculturalist Values' in David Kretzmer & Eckart Klein (eds), *The Concept of Human Dignity in Human Rights Discourse* (The Hague: Kluwer Law International, 2002) 263, 265 [recognition of the rhetorical value of claims about human dignity despite malleability, that is, lack of tightness of the concept's logic]; McCrudden (2008) 655, 722 ['[…] as merely rhetorical. The courts use the concept of dignity merely to disguise, for example, the absence of theory on how to resolve the conflict between incommensurable values. Instead of making a choice between conflicting rights, they present the conflict as an issue internal to dignity.']

phenomenological accounts of the law of human dignity sharpen our understanding of the practice of human dignity in the illustrative instances of FCC jurisprudence under scrutiny?

Second, how can we portray the practice of human dignity? Applying the model designed in Chapter One to actual instances of judicial practice understood as legal language games advances another construal of the legal concept's meaning. To the limited extent that the text of judicial decisions, the primary material subject to interpretation in Chapter Two, mirrors judicial practice[190] and, more broadly, the production of meaning by the constitutional judge, who is simultaneously an institution and a human being, where does the human factor lie in the portrayed legal language games? The presently introduced hermeneutic and literary prism permits identifying[191] and portraying the human factor within legal language games, in other words centers on the faces of human beings, individuals or groups[192], within institutional frameworks[193]. How does the dual sense of 'something missing' influence the breadth of legal language games and the rigidness of their boundaries?

Third, how and why is 'something missing' incidental to legal language games, and when is 'something missing' first perceived? How does the FCC as the

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[190] Susanne Baer, 'Thematisierungen – Körper, Sprache und Bild im Prozeß', in Klaus R. Scherpe & Thomas Weitin (eds), *Eskalationen – Die Gewalt von Kultur, Recht und Politik* (Tübingen, Basel: A. Francke Verlag, 2003) 109, 117 [other facets of practice]

[191] Legal sociology and cultural studies are also suitable for identifying the human factor within the legal language game and, specifically, within institutions.

[192] Kunig, Art. 1, *GG Kommentar* (2012) para 17 [Art. 1 sec. 1 provides respect and protection for the human being not only as an individual, but also as an individual in a group. Kunig includes, under fn. 101, a fragment from the BGHZ 75, 160 Case addressing the special personal relationship of Jewish people who live in Germany to their co-citizens: '[…] in diesem Verhältnis ist das Geschehen auch heute gegenwärtig. Es gehört zu ihrem personalen Selbstverständnis, als zugehörig zu einer durch das Schicksal herausgehobenen Personengruppe begriffen zu werden, der gegenüber eine besondere moralische Verantwortlichkeit aller anderen besteht, und das Teil ihrer Würde ist'.]

[193] See Binder & Weisberg, *Literary Criticism of Law* (2000) 48 ['For Lieber, all linguistic expression is linked to religious and aesthetic feeling and aims to articulate the self in a concrete, sensuous, and inherently social medium. Thus, meaning is not conferred on language by private intentions that preexist their articulation; instead, meaning inheres in language's use by groups of language users, especially institutions.']; ibid 476 ['[…] Bourdieu is particularly interested in practices like law, where decision-making discretion is vested in office. By virtue of their office, particular decision-makers exercise a personal power that, because it is not reducable to force or wealth, is 'symbolic,' that is, an effect of meaning.']; ibid 373 ['[…] a 'character' is primarily an interpretation of the relationship between one's institutional roles and one's subjective inner life, a strategy for accommodating one's dignity as a supposedly self-determined person to the reality of bureaucratic power.']; Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics: with Remarks on Precedents and Authorities* (originally published in Boston: C.C. Little and J. Brown, 1839; reprinted in Union, NJ: The Lawbook Exchange, LTD., 2002) 13-17; See also Gerald Frug, 'Argument as Character' (1988) 40(4) *Stanford Law Review* 869; Aristotle, *The Art of Rhetoric* (with an Introduction by Hugh Lawson-Tancred, Hugh Lawson-Tancred, ed and tr, London: Penguin Classics, 1992) [see character in Aristotle's *The Art of Rhetoric*]

speaking self and author of judgments practice the law of human dignity in different contexts? Are other selves and their – not necessarily legal – language games represented in the judicial practice of human dignity? Does the self demonstrate responsibility towards the other, namely human beings before the court, i.e. individuals, groups, and society more generally? What is the meaning of responsibility *in abstractor* and how is it defined *in concreto* in the instances of judicial practice under scrutiny? Which portrayal of the relation between the self and the other corresponds to and allows for the humane practice of the law, even of the law of human dignity as such? How does the FCC, to wit the critical self producing human dignity meaning in the present study, engage in self-reflection? Are there allusions to the meta-dimension of the law of human dignity in the text of cases analyzed in Chapter Two?

The central thesis of this hermeneutic and literary project is: the transcendental meaning of the law of human dignity, which assumes 'something always missing', is activated where and when that law – first and foremost as language – is practiced. The law of human dignity operates at the limit between 'what is there', the finite totality of legal language games and the plane where 'something missing' can occur, and 'something always missing', the infinite beyond the limit. Transcendence signifies a movement, that is to say, a process, that results in the institution of infinitely new, diverse imprints of human being-ness within the realm of law, in the space where 'something was missing'; 'something missing' then corresponds to the part of those who have no part.[194] Understanding the dual sense of 'something missing' as an essential aspect of human dignity meaning is attuned to the humane practice of the law of human dignity, that is, mobilization entailing critical reflection. 'Something missing' and 'something always missing' trigger and provide for the initiation of critical reflection on the meaning produced.

Critical reflection presupposes the portrayal of practice, and the quality of the former is contingent on the aptitude of the latter to intricacies of the production of human dignity meaning, such as balancing considerations and the reconciliation of universals and particulars mentioned *supra*. If, as argued in the phenomenological

[194] Rancière, *Dissensus* (2010) 35 ['Politics exists insofar as the people is not identified with a race or a population, nor the poor with a particular disadvantaged sector, nor the proletariat with a group of industrial workers, etc., but insofar as these latter are identified with subjects that inscribe, in the form of a supplement to every count of the parts of society, a specific figure of the count of the uncounted or of the part of those without part.']

account, the formation of an intersubjective space within the legal language game[195] fosters the humane practice of the law of human dignity, then the intersection of a legal language game comprising human dignity language with other language games could be an indication of intersubjectivity, thus a starting point for further inquiry and critical reflection. The methodological approach I opt for is attuned to the commitment to critical reflection. In the remaining part of the Introduction, the hermeneutic and literary methodological approach to the textual practice of the law of human dignity is elaborated on and the evolution of my argument is outlined.

C. Methodological approach and evolution of the argument

The methodological approach chosen is the hermeneutic and literary treatment of the law of human dignity in texts[196] as elements of judicial practice; to these ends philosophical insights are employed to construct a model. The argument advances a genuinely affirmative stance towards the dual sense of 'something missing'. What are the methodological implications and the advantage of opting for a hermeneutic and literary approach? As regards the former, recourse to hermeneutics and literary criticism to construct a model for portraying the practice of the law of human dignity in seminal cases in FCC jurisprudence, and to thereby bridge philosophy and law brings about transdisciplinarity. The main advantage of a hermeneutic and literary approach to law is the fluency it grants for drawing parallels between concepts developed across disciplines and its aptness to highlight the human factor, even within institutions, and to portray manifestations of human being-ness. The hermeneutic and literary methodological approach[197] aims to improve our understanding of the dual

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[195] Levinas, *Totality and Infinity,* 290

[196] Gadamer, *Truth and Method* (1975, 2004) 392 ['[…] written texts present the real hermeneutical task. Writing is self-alienation. Overcoming it, reading the text, is thus the highest task of understanding. Even the pure signs of an inscription can be seen properly and articulated correctly only if the text can be transformed back into language. As we have said, however, this transformation always establishes a relationship to what is meant, to the subject matter being discussed.']; ibid 396 ['Everything written is, in fact, the paradigmatic object of hermeneutics. […] The horizon of understanding cannot be limited either by what the writer originally had in mind or by the horizon of the person to whom the text was originally addressed.']

[197] Binder & Weisberg, *Literary Criticism of Law* (2000) ix ['[…] the many ways we can view law as a kind of literary or cultural activity […] law as a practice of making various kinds of literary artifacts: interpretations, narratives, characters, rhetorical performances, linguistic signs, figurative tropes, and representations of the social world […] law as a process of meaning making and as a crucial dimension of modern cultural life.']; The Gadamerian strand of hermeneutics as the 'a general theory of the understanding and interpretation of texts' in most pertinent to the present approach. See Gadamer, *Truth and Method* (1975, 2004) 321; ibid 366 f. ['The most important thing is the question that the text puts to us […]. […] The voice that speaks to us from the past – whether text, work, trace – itself poses

sense of 'something missing' through interpretation in light of the philosophical insights in Chapter One, and engages accordingly in literary analysis and criticism of legal texts[198] in Chapter Two. Working with the law means working with texts[199]; approaches to law are, considerably, approaches to texts.

Hermeneutic criticism 'treats interpretation as the basic mode of literary action […].'[200] The claim underpinning hermeneutic criticism is that 'law is most fundamentally a practice of interpretation.'[201] Gadamerian hermeneutics'[202] emphasis on the speaking text[203], enabled by detachment of 'what is spoken' from 'the speaker' and 'the permanence that writing bestows'[204], and on the 'nature of the thing coming to expression', instead of 'designating the human subject […] as the fixed point of

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a question and places our meaning in openness.']; See also Richard E. Palmer, *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer* (Evanston, Illinois: Northwestern University Press, 1969) 201 ['Fundamental to Gadamer's conception of language is the rejection of the "sign" theory of the nature of language. Over against the emphasis on form and instrumental functions of language, Gadamer points to the character of living language and our participation in it.']; ibid 202-203 [language is not a symbolic form]

[198] Palmer (n 197) 12 ['The roots for the word hermeneutics lie in the Greek verb *hermeneuein,* generally translated "to interpret" and the noun *hermeneia,* "interpretation." An exploration of the origin of these two words and of the three basic directions of meaning they carried in ancient usage sheds surprising light on the nature of interpretation in […] literature […].']; ibid 13 ['[..] the […] verb *hermeneuein* and noun *hermeneia* point back to the wing-footed messenger-god Hermes, from whose name the words are apprently derived (or vice versa?). Significantly, Hermes is associated with the function of transmuting what is beyond human understanding into a form that human intelligence can grasp. The various forms of the word suggest the process of bringing a thing or situation from unintelligibility to understanding. The Greeks credited Hermes with the discovery of language and writing – the tools which human understanding employs to grasp meaning and to convey it to others. […] traced back to their earliest known root words in Greek, the origins of the modern words "hermeneutics" and "hermeneutical" suggest the process of "bringing to understanding," especially as this process involves language, since language is the medium par excellence in the process.']; ibid 14 ['Interpretation can refer to three rather different matters: an oral recitation, a reasonable explanation and a translation from another language [….] in all three cases, something foreign, strange, separated in time, space, or experience is made familiar, present, comprehensible; something requiring representation, explanation, or translation is somehow "brought to understanding" – is "interpreted."']; ibid ['Literary interpretation […] involves two of these processes and often a third. Literature makes a representation of something which must "come to be understood." […] The task of interpretation must be to make something that is unfamiliar, distant, and obscure in meaning into soemthing real, near, and intelligible. The various aspects of this interpretation process are vital to literature […].']

[199] See Friedrich Müller, Ralph Christensen & Michael Sokolowski, *Rechtstext und Textarbeit* (Berlin: Duncker & Humblot, 1997)

[200] Binder & Weisberg (n 197) 20

[201] ibid

[202] ibid 133 ['Gadamer insists that because his hermeneutics both implicates and depends upon the interpreter, it should not be seen as a *method*. Instead, it is a challenging process of *Bildung* or self-cultivation.']; See also Dworkin, *Law's Empire* (1986) 62 [Dworkin contends that Gadamer's account of interpretation 'as recognizing, while struggling against, the constraints of history strikes the right note.']

[203] See Binder & Weisberg, ibid [on 'Gadamer's tendency to anthropomorphize the text', according to David Couzens Hoy, *The Critical Circle: Literature, History, and Philosophical Hermeneutics* (Berkeley, Los Angeles, London: University of California Press, 1982)]

[204] Gadamer, *Truth and Method* (1975, 2004) 396

reference'[205], render this account most germane to the presently adopted methodological approach. Interpretation presupposes that the 'horizons' of the interpreter and the text overlap to some extent[206]. Tracing and depicting the human factor in portrayals of the practice of the law of human dignity sets off from exploring the meaning conveyed by the language employed in legal language games. The themes and insights introduced thereby shall label the range of issues on which this analysis sheds light, which are indeed diverse as material- and subject-matter-oriented, in other words, as escaping classification under a distinct strand of thought and discourse. How does emphasis on the human factor advance a more humane perspective on law, thus, also, law's humane practice?

> Literature can offer a complex, multilayered experience that transcends rigid categories, alerting us to the plurality and dynamism of the meanings we attach to social life.[207]
> […] associations evoked when we are exhorted to experience law in a more literary way. We are urged to express our authentic selves and escape alienating roles and to value passion – especially empathy, mercy, love – over reason and rule. Yet we are also urged to be detached rather than engaged, decorous rather than vulgar, gracious rather than grasping, and to value each other aesthetically rather than instrumentally. We must be prepared to decry big institutions as heartless and small ones as petty and provincial. We are encouraged to be inventive, eloquent and refined. [208]

Methodological clarity calls for appreciation of the risks[209] lurking in pairing the disciplines of law and literature. Sentimentalism[210], 'a facile sophistication that mistakes *skepticism*[211] for criticism and dishonors good causes with bad arguments'[212], and 'a genteel authoritarianism'[213] are three conceivable risks. The

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[205] Palmer (1969) 204
[206] Gadamer (n 204) 301; ibid 305 ['[…] understanding is always the fusion of these horizons supposedly existing by themselves.']
[207] Binder & Weisberg (n 197) 4
[208] ibid 16
[209] ibid 4-7
[210] ibid 16 ['[…] in which passion is never cruel or self-indulgent or muddle-headed, invention is never destructive or dishonest, and civility is always inclusive and never elitist.']
[211] For one conceivable definition of skepticism see ibid 17 ['Skepticism is the disposition to view practices as illegitimate unless they can be shown to rest on some justificatory foundation independent of human purposes. In legal thought, skepticism usually demands that legal thought or practice justify itself by reference to some kind of objective knowledge – of moral truth, linguistic meaning, or popular will. Skeptical criticism of law tends to vastly overestimate the role of metaphysics and epistemology in justifying the authority of political institutions and thereby evades political argument and grapples with strawmen. In the field of Law and Literature, skeptical criticism often involves the additional vice of equating the literary with the merely subjective, thereby reducing it to a pejorative epithet.']
[212] ibid 16

thoroughgoing validity of the proposition that 'law is […] myopic while literature is subtly perceptive […]'[214] may also be challenged. Besides being 'a kind of language', literature 'is also an institution with its own interests and jurisdictional turf.'[215] Law and literature are 'historically specific disciplines'[216] and, as such, strive to monopolize 'the indispensable and inextricable cultural functions of defining authority and making meaning'[217] respectively, but fail to do so.

> […] we may identify 'the literary' narrowly with the work of a particular profession, or more broadly with imagination, complexity of perception, density of meaning, and the qualities of dramatic and aesthetic interest. If we conceive 'the literary' in these broader terms, it becomes a meaning-making function that pervades social life. It is when we take law and literature in theses broad senses that the relation between them becomes the richest and most interesting.[218]

In terms of its theoretical underpinnings, this inquiry could be viewed as a regression to natural law doctrine[219]; an effort to complement the evolution of human dignity in the history of ideas[220]; an attack on legal positivism[221], legal doctrine [*Rechtsdogmatik*], and the theory of legal argumentation as limited prisms[222] through which to approach, understand, and design the practice of human dignity in law, and,

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[213] ibid ['[…] that restricts the aesthetic to the role of ornamenting institutionalized power and becalming the spirit of discontent.']
[214] ibid 4
[215] ibid 5; See also, Tony Sharpe, '(Per)versions of Law in Literature' in Michael Freeman & Andrew Lewis (eds), *Law and Literature* (Oxford: Oxford University Press, 1999) 91
[216] Binder & Weisberg, ibid 5
[217] ibid
[218] ibid
[219] Denninger (1998) *JZ* 1129, 1130f.; Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 19 [Naturrechtliche Vorstellungen]; See also Baer, *Rechtssoziologie* (2011) 61 [The Enlightenment generated criticism in different parts of Europe regarding the treatment of questions on justice in light of 'some kind of metaphysical (literally: standing over the real)' existence. The core of religious philosophical foundations of justice was the notion of *physis*, the Greek word for nature, discussed in relation to metaphysics and *techne* in the philosophical works of Aristotle. Justice in natural law doctrine is grounded in the nature of human beings, is, in other words, social-anthropological. Natural law philosophers composed the human image or icon (*Menschenbild*) in different ways. 'In any case, from the empirical, allegedly objective, physical is (*Sein*) derived a normative, legal should (*Sollen*). For law what follows is that there is a measure of justice, which is not positively established, found in neither human rights, nor a constitution or laws, but is in force – just as belief – "beyond the law".' (M. Ch. tr).]; ibid 62 ['The natural law doctrine understands justice […] as a kind of basal rule of humanity.']
[220] Franz Josef Wetz, *Illusion Menschenwürde – Aufstieg und Fall eines Grundwerts* (Stuttgart: Klett-Cotta, 2005) 14ff. [cultural history of dignity]
[221] See Denninger (1982) *JZ* 225; ibid (1998) *JZ* 1129, 1130 [positivist v. natural law perception of the law of human dignity and fundamental rights in the order of the Basic Law]; Gadamer, *Truth and Method* (1975, 2004) 511
[222] The gap-filling function of legal hermeneutics apropos legal dogmatics enhances the contention that these approaches constitute limited prisms for understanding the practice of the law of human dignity. See Gadamer, ibid 321

what is more, as theories often misunderstood to be fortresses of objectivity. Critical reflection on the practice of the meta-dimension of the law of human dignity emphasizes the transcendental rather than, just, metaphysical meaning of the legal concept, and thereby assumes the dynamism of a relational account of practice, rather than the static rendering of 'something always missing'.[223] Irrespective of intersection with the indicatively enumerated theoretical discourses the argument is oriented towards the more concrete goal of advancing a genuinely affirmative stance towards the dual sense of 'something missing'.

> […] we will encourage legal scholarship that explores and enhances the expressive and compositional power of legal thought and practice in the specific political and economic worlds in which they operate. Such a scholarship recognizes the literary as a constitutive dimension of law rather than a redemptive supplement. If law is inevitably literary, the call to make it so is not just pointless but deceptive: it implies that if only law becomes more literary, criticism of law will no longer be necessary. To recognize the constitutive literary dimension of law is not to commend law as inevitably humane or redemptive, however. Law's creations may starve the poor or demean the weak; they may arise out of struggle, strategy, and violence. They demand critical evaluation. Nevertheless, laws, legal judgments, and legal transactions all have expressive meaning, and to miss law's meaning is to miss a part of what needs criticism. Thus, there is no reason why the literary reading of law must be laudatory. To say that law is literary is also to admit that literature is, like law, an arena of strategic conflict. [224]

The following clarifications substantively delineate the research objective: (a) the dignity of states, courts, professions, and, more generally, institutions[225] as

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[223] Stöcker (1968) 685, 685f. [Stöcker identifies the sociological, metaphysical and critical methodological aspects of the concept of human dignity and understands the latter as the process of abstracting from particulars only so as to improve the environment at the level of particulars.]; William N. Eskridge Jr., 'Gadamer / Statutory Interpretation' (1990) 90(3) *Columbia Law Review* 609, 614 [Drawing on Gadamer's *Truth and Method* and the ensuing philosophical debate Eskridge notes: '[…] interpretation is not merely an exercise in discovery, but involves a critical approach to the text. The interpreter questions the text, the presuppositions of which may be attenuated or undermined over time. In turn, the interpreter uses the experience to re-evaluate her own pre-understandings, to separate the enabling, truth-seeking ones from the disabling, false ones.']

[224] Binder & Weisberg, *Literary Criticism of Law* (2000) 19

[225] Illustrative examples of such practice of dignity language in ECtHR jurisprudence are: *Le Compte, Van Leuven and de Meyere v. Belgium* (Application no. 6878/75; 7238/75) [23/06/81] ['dignity of the profession']; *Amihalachioaie v. Moldova* (Application no. 60115/00) [20/07/04]; *Nikula v. Finland* (Application no. 31611/96) [21/06/02]; *Kyprianou v. Cyprus* (Application no. 73797/01) [15/12/2005] ['dignity of the court']; *Kudeshkina v. Russia* (Application no. 29492/05) [26/02/09]; See Stéphanie Hennette-Vauchez, 'A human *dignitas*? Remnants of the ancient legal concept in contemporary dignity jurisprudence' (2011) 9(1) I•CON 32, 53 ['[…] *dignitas* is not specifically human: institutions, the state, its emblems, and the like may be dignified in that sense.']

opposed to human beings, individuals or groups,[226] is not relevant to present purposes; (b) while acknowledging the philosophical and semantic importance of distinguishing between the various formulations of human dignity language in legal texts other than 'human dignity' or the 'dignity of the human being', those considerations are deliberately cast aside in the present analysis. Conscious of the rich discourse in philosophy and law on the terms 'person'[227] and 'personality'[228] and admitting the terminological divergence of the different phrasings, the argument is confined to the terms 'human being'[229] and 'dignity', both of which are fundamentally implied in other variations. The risk of feebleness[230] is assumed in order to enhance the intelligibility and directedness gained by this limited, yet not exclusionary, phraseology; (c) emphasis on the 'human' component of 'human dignity' serves as a

[226] An example of human dignity language associated with group rights in international law documents is the *International Convention on the Suppression and Punishment of the Crime of Apartheid* (1973) [Article II: '[…] the term 'crime of apartheid' […] shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them: (a) Denial to a member or members of a racial group or groups of the right to life and liberty of person: [ii] By the infliction upon the members of a racial group or groups of serious bodily or mental harm, by the infringement of their freedom or dignity, or by subjecting them to torture or to cruel, inhuman or degrading treatment or punishment;']

[227] Etymologically the term 'person' comes from the Latin *persona* or the Greek *πρόσωπον,* and can be associated to *προσωπεῖον*, the Mask. Robert Spaemann, *Personen. Versuche über den Unterschied zwischen „etwas' und „jemand'* (Stuttgart: Klett-Cotta, 1996) 33; ibid 253; See also Joachim Ritter, Karlfried Gründer & Gottfried Gabriel (eds), *Historisches Wörterbuch der Philosophie* (Bd. 7 (P-Q), Darmstadt, Basel: Schwabe Verlag, 1989) 269

[228] BVerfGE 9, 167 (171) (1959) [*Economic Crime Act*] ['Ist aber der Bereich der sittlichen Persönlichkeit des Menschen überhaupt nicht berührt, so scheidet ein Verstoß dieser gesetzlichen Regelung gegen die Menschenwürde aus […].']; See Badura (1964) *JZ* 337, 340; Linda Zagzebski, 'The Uniqueness of Persons' (2001) 29(3) *The Journal of Religious Ethics* 401 [considers five definitions of 'person': '(1) an individual substance of a rational nature (Boethius), (2) a self-conscious being (Locke), (3) a being with the capacity to act for ends (Kant), (4) a being with the capacity to act for another (Kant), and (5) an incommunicably unique subject (Wojtyla)']; Hans-Gregor Nissing, 'Vorwort' in ibid (ed), *Grundvollzüge der Person – Dimensionen des Menschseins bei Robert Spaemann* (München: Institut zur Förderung der Glaubenslehre, 2008) 7; Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 9-20 [commenting on Jan Christiaan Smuts' opting for, at first, the word 'personality' and, after the rejection of the first proposal, the word 'person', rather than 'human being' in the United Nations Charter]; ibid 16 ['[…] damit [mit dem Begriff *Persönlichkeit*] verbindet sich die Vorstellung einer besonders distinguierten Form von Menschsein, während *Person* jeder Mensch ist, zumindest aber jeder handlungs- und zurechnungsfähige Mensch. Das Menschsein und das Personsein konnte Smuts der farbigen und schwarzen Bevölkerung seines Landes schwerlich absprechen, die Persönlichkeit schon. Es scheint mir daher nahe liegend, dass Smuts deshalb dem Wort *Persönlichkeit* den Vorzug gab, weil dies ihm erlaubt hätte, das Würdekonzept von verneherein nur auf die weiße Rasse anzuwenden […].']; ibid 85; ibid 244

[229] See Menachem Mautner, 'From 'Honor' to 'Dignity': How Should a Liberal State Treat Non-liberal Cultural Groups?' (2008) 9 *Theor.Inq.L.* 609 [associates dignity with humanness rather than the notion of the 'person']

[230] The seriousness of the distinction between 'being a person' and 'being an individual human being' is indicated by Zagzebski (n 228) 401, 404 ['[…] some recent ethicists have used the conceptual distinction between "person" and "human being" to argue that some human beings are not persons and some persons are not "human" – and that it is persons that have the moral rights.']

starting point for exploring qualities of human being-ness and portraying relations among human beings within the realm of law, instead of relying on biological sameness [*Gattungswürde*[231]]; (e) exploring the 'human' in human dignity language denotes juxtaposition with non-'human' dignity[232]. The distinction between human beings and other living organisms[233] is prevailing in the discourse. This discussion also exceeds the purposes of this approach[234].

The overview centers on scholarly discussions about the constitutional guarantee of human dignity in the Basic Law. In addition, I resort to Anglo-American literature to accord this argument comparative relevance[235]. Methodologically, this effectuates an alienation or distancing from the German perspective that enhances the

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[231] Cf. Vitzthum (1985) 201; Dan Egonsson, *Dimensions of Dignity – The Moral Importance of Being Human* (Dordrecht: Kluwer Academic Publishers, 1998) [Dan Egonsson proposes identifying a distinct moral status in the biological origin of the *homo sapiens.*]; Nettesheim (2005) 71; See also Nussbaum, *Frontiers of Justice* (2006) 179ff. [the species norm]; Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 80 f.

[232] Nussbaum ibid 325-407

[233] See Robert Spaemann, 'Über den Begriff der Menschenwürde', in Ernst-Wolfgang Böckenförde & Robert Spaemann (eds), *Menschenrechte und Menschenwürde. Historische Voraussetzungen – säkulare Gestalt – christliches Verständnis* (Stuttgart: Klett-Cotta, 1987) 295, 297 ['Von Würde sperchen wir in bezug auf einen Löwen oder ein Zeburind ebenso wie […] auf eine jahrhundertealte alleinstehende Eiche.']; ibid 307 ['Außermenschliche Wesen können den Zweckzusammenhang, in den sie selbst von außen hineingezogen werden, nicht zu ihrem eigenen machen']; Nussbaum, *Frontiers of Justice* (2006) 325-407 ['Beyond 'Compassion for Humanity': Justice for Nonhuman Animals']; Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 26; Kunig, Art. 1, *GG Kommentar* (2012) para 16 ['[…] denoch ist Art. 1 Abs. 1 für die Beurteilung des Umgangas mit Tieren ergiebig, sofern er als Staatszielbestimmung ein Leitbild ist.']; See also Günter Dürig, 'Die Menschenauffassung des Grundgesetzes' (1952) *JR* 259, 260f.; Badura (1964) *JZ* 337, 339 ['Nach nahezu einhelliger Auffassung hat Art. 1 I GG die Anthropologie der idealistischen, "personalen" Ethik verfassungsrechtlich verankert, wonach der Mensch "Persönlichkeit" sei, dadurch, daß er anders als das Tier zu verantwortlichem ethischen Handeln befähigt sei; der Verfassungsbefehl gebiete, alle staatliche Tätigkeit an dieser Auffassung vom Menschen auszurichten, und verbiete alle staatliche Tätigkeit, die diese Auffassung vom Menschen mißachte.']

[234] See, however, the ban on 'alligator-man fights' in an entertainment park, grounded on the helplessness of the animal – comparable to the helplessness of a minor – and expressly recognizing the alligators' dignity in *Let the Animals Live v. Hamat Gader Spa Village Inc Case* (1997) 1648/96 of the Supreme Court of Israel. The practice of dignity language and the analogy drawn between human dignity and non-human dignity in this case is of pertinence to the present hermeneutic and literary project. See McCrudden's comment on the case in McCrudden (2008) 655, 708

[235] See Günter Frankenberg, 'Critical Comparison: Re-thinking Comparative Law' (1985) 26 *Harvard International Law Journal* 411; ibid, 'How to do Projects with Comparative Law – Notes of an Expedition to the Common Core' (2006) 6(2) *Global Jurist Advances* 1535 [in group comparative projects this distancing is more obvious]; ibid, 'The IKEA theory revisited' (2010) 8(3) *International Journal of Constitutional Law* 563 [Despite diversity among constitutional documents, demonstrated in comparative law scholarship, it can be contended that constitutions across the globe take the form of a single written document that appears to comprise similar types of constitutional provisions across the globe. Though local, that is, particulars, constitutions are subject to 'globalization' and this is not only a globalization of texts, but also one of viewpoints. The IKEA theory furthers that these particulars are transferred to the 'global constitution' and are then hosted anew in a local environment.]; See also, Jaye Ellis, 'General Principles and Comparative Law' (2011) 22(4) *European Journal of International Law* 949 [emphasis on the universals connoted in 'general principles of international law' results in missing on the richness of particulars of legal systems outside international law]; See also Günter Frankenberg, 'Comparative Constitutional Design' (2013) 11(2) *International Journal of Constitutional Law* 537

critical view on the practice of the law of human dignity. The validity of my argument beyond the German example and the contribution of the FCC-centered analysis in Chapter Two to future comparative projects is not foreclosed; references to illustrative instances of practice in other legal orders hint at the probable – hence reasonable – relevance of my observations beyond Germany and the FCC. The personal aspiration underlying this argument is that the model put forward in Chapter One is resorted to – where necessary with possible appropriate modifications – in hermeneutic and literary approaches to the jurisprudence of other courts. The value of turning to comparative insights deduced from constitutional law, European Union and international law to enrich our understanding of human dignity meaning and to appreciate appropriate standards for concretizing the constitutional concept is already established in German legal doctrine.[236] Art. 1 sec. 2 GG and Art. 1 sec. 1 GG can be viewed together as normative impetus for engaging in comparative research.[237]

Recourse to comparative sources of insights serves the relativization of what amounts to a violation of human dignity and triggers a process of constant reflection on actual practice that is essential to preventing or correcting risks[238], such as, first, the tendency of trivialization and inflationary argumentation famously put as rendering the legal concept '*kleine Munsee*' [small change][239], thus devaluing the guarantee of respect and protection; second, state paternalism[240], namely protecting individuals from their own actions[241] in view of certain established values; third, value absolutism, in which case, instead of protecting the individual human being, the

[236] See BVerfGE 131, 268 (295) (2012) [*Sicherungsverwahrung*] [exploring the relation between the Basic Law and the ECHR; affirmation of the international dimension of the Basic Law]; Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 3 [The consecutive association of the guarantee of human dignity with 'inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world' in Art. 1 sec. 2 GG bridges the Basic Law order and the international law community by instituting fundamental rights and, at once, proposes 'universally valid standards for the concretization of the "humanitarian minimum" [*humanitären Minimums'*]in Art. 1 sec. 2 and 1 GG'. (trans. M. Ch.)]

[237] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 3

[238] As demonstrated *infra,* the practice of human dignity involves necessarily the confrontation of universals with particulars and vice versa, and this confrontation is circular, namely a *circulus in probando* argumentation.

[239] Dürig, Vorauflage, *Grundgesetz: Kommentar* (1958) para 29; Grimm, *Die Würde des Menschen ist unantastbar* (2009) 13 ['Ich halte diese Trivialisierung für ebenso schädlich wie die Superlativisierung der Sprache, weil sie das Unterscheidungsvermögen beeinträchtigt.']

[240] Baer, 'Triangle' (2009) 417, 457ff.

[241] Michael Köhne, 'Abstrakte Menschenwürde?' (2004) *GewArch.* 285, 286 [the *Objektformel* does not apply in instances of infringements of human dignity being the result of one's own actions]; ibid 287 [Fundamental rights are conceived primarily as defense rights of the citizen against the state. This does not mean that Art. 1 sec. 2 GG can provide grounds for protecting the human being from him or herself ['vor sich selbst'].]

law of human dignity is practiced so as to protect humanity or the human species [*den Mencken als Gattungswesen*][242]; and fourth, extremism[243], in other words reducing the practice of Art. 1 sec. 1 GG to the prohibition of apocalyptical brutalization[244].

Reference to two illustrative versions of baffling mainstream argumentation fine-tunes the delineation of this approach apropos scholarly discussions on the desirability of resorting to the history of ideas for determining the legal guarantee in Art. 1 sec. 1 GG and elucidates the orientation of this analysis. Warnings against the adoption of particularistic ethics and deference to a distinct philosophical conception of human dignity in the long[245] history of ideas as critical to the concept's constitutional interpretation are reasonable.[246] The idea cuts through antiquity, Christian doctrine, the natural law tradition, Renaissance and Enlightenment, the thought of Pico della Mira Ndola, who considered the human being a microcosm of 'being possibilities', a *plastes* and a *fictor*; of Kant, who introduced an original metaphysical sense of the concept and refined the reason-determined autonomous existence of human beings; and the political and social dimensions of the concept that developed in the 19th and 20th century.[247] Distinguishing any of the above as decisive, at least at the level of legal doctrine, would be tantamount to arbitrarily opening the

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[242] See the *Peep Show Case,* Federal Administrative Court, BVerfGE 64, 274 (1981); See also Hoerster's commentary on the *Peep Show Case* in Norbert Hoerster, N., 'Zur Bedeutung des Prinzips der Menschenwürde' (1983) Heft 2 *JuS* 93, 95-96 [The principle of human dignity in actuality enables giving individual and frequently very personal valuations a pseudo-objective ostensible legitimacy.]; Köhne (2004) *GewArch.* 285, 285 ff. [Köhne stresses the free will of individuals involved in cases such as the *Peep Schow Case,* the *Dwarf-throwing Case* of the UN Human Rights Committee Communication No. 854/1999; the *'Tanz der Teufel' Case* BVerfGE 87, 209; the *Laserdrome Case, Omega Spielhallen-und Automatenaustellungs GmbH v Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02 (ECJ, 2004)]; ibid 287 [the law of human dignity guarantees human beings self-determination and, consequently, their self-determined portrayal in law]; See also Henning v. Olshausen, 'Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?' (1982) *NJW* 2221, 224 [the real social relevance of an alleged violation of human dignity should be scrutinized]

[243] Baer, 'Triangle' (2009) 417, 459 [on the tendency of extremism in "filling" human dignity meaning]

[244] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 35; See also Michael Kloepfer, 'Leben und Würde des Menschen' (2001) 77, 97; Deviating, cf. Karl-Eberhard Hain, 'Konkretisierung der Menschenwürde durch Abwägung?' (2006) 45 *Der Staat* 189, 205

[245] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 2 [long can also mean burdensome]

[246] For a positivist perspective, see Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 20; The concept's philosophical background, as valuable a source of insights for deepening our understanding of its evolution in the course of time, cannot adequately determine its meaning and practice in law, and should neither pose constraints nor direct legal actors in interpreting Art 1 sec. 1 GG. See Kunig, Art. 1, *GG Kommentar* (2012) para 19 ["The concept of human dignity concentrates a variety of cognitions and evaluations concerning human beings, the role of the state and the society, the meaning of its existence, which have been formulated by philosophy and theology, as well as modern social sciences, without succeeding in reaching generally valid statements under a high level of abstraction."]

[247] See Wetz, Illusion Menschenwürde (2005) 14ff. [cultural history of dignity]; Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 109-174

door to particularistic ethics. The present argument decisively deviates from inquiries into the philosophical background of the idea, or even interpretations of the legal concept in light of a specific historical signification[248]. Finding answers to 'how', 'why' and 'when' the dual sense of 'something missing' is practiced within the realm of law in the history of the idea of human dignity is quite unlikely, since conceptions ensuing therefrom either compete in defining, positively, its content, or define it as content-less[249].

These two projects, anchoring the concept's practice in law to conceptions of human dignity in the history of ideas and employing, as presently, philosophical insights in a hermeneutic approach to the legal concept[250], share one fundamental similarity: they bridge philosophy and law.[251] Their difference lies in that the former

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[248] See Stéphanie Hennette-Vauchez, 'A human *dignitas*? Remnants of the ancient legal concept in contemporary dignity jurisprudence' (2011) 9(1) I•CON 32-57; See also Jeremy Waldron, 'Dignity and Rank: In Memory of Gregory Vlastos' (2007) 2 *Archives Européennes de Sociologie* 201

[249] See Arthur Schopenhauer, *The Basis of Morality* (1837) (*Über die Grundlage der Moral*, with an Introduction by Arthur B. Bullock tr, 2nd edn, Mineola, NY: Dover Publications, 2005)

[250] Binder & Weisberg, *Literary Criticism of Law* (2000) 466 ["[…] the value of such research resides not in any confirmation of the power of a single method to subject an ever broader domain of data to a sovereign theory, but in an artful disjunction of method and data to illuminate a particular society's images of and beliefs about itself."]

[251] The methodological approach adopted bridges philosophy and law, while, at the same time, introducing a further disciplinary perspective, that of hermeneutics and literary criticism. The unavoidable clumsiness of such analysis can be viewed in light of Geertz's remark on the 'discomposing' nature of applying theories and methods of one discipline to another. See Geertz, *Local Knowledge* (1983) 8 [Bridging disciplines is 'discomposing not only because who knows where it will all end, but because as the idiom of social explanation, its inflections and its imagery, changes, our sense of what constitutes such explanation, why we want it, and how it relates to other sorts of things we value changes as well. It is not just theory or method or subject matter that alters, but the whole point of the enterprise.']; 23f. ["It is not interdisciplinary brotherhood that is needed, nor even less highbrow eclecticism. It is recognition on all sides that the lines grouping scholars together into intellectual communities, or (what is the same thing) sorting them out into different ones, are these days running at some highly eccentric angles."]; The variable understandings of what inter- and transdisciplinarity entail render careful delineation imperative. See Jürgen Mittelstraß, *Wissen und Grenzen – Philosophische Studien* (Frankfurt am Main: Suhrkamp, 2001) 89, 92f. [interdisciplinarity defined "in truth" as transdisciplinarity necessitated by the research project at hand]; Herald Völker, 'Von der Interdisziplinarität zur Transdisziplinarität?' in Frank Brandt, Franz Schaller & Herald Völker (eds), *Transdisziplinarität – Bestandsaufnahme und Perspektiven – Beiträge zur THESIS-Arbeitstagung im Oktober 2003 in Göttingen* (Göttingen: Universitätsverlag Göttingen, 2004) 9; Philipp W. Balsiger, *Transdisziplinarität* (München: Wilhelm Fink Verlag, 2005) 135; Oliver Lepsius, 'Sozialwissenschaften im Verfassungsrecht – Amerika als Vorbild?' (2005) *JZ* 1, 1-4 [division of work in interdisciplinary projects undertaken by more than one researchers]; Eric Hilgendorf, 'Bedingungen gelingender Interdisziplinarität – am Beispiel der Rechtswissenschaft' (2010) *JZ* 913, 914 f.; ibid 921f. [ambiguity of the term "interdisciplinarity" and necessity of clear delineation, framing and phrasing to overcome it]; See the overview of the discourse on interdisciplinarity in the presentation of the methods of the interdisciplinary work of Nora Markard, *Kriegsflüchtlinge* (Tübingen: Mohr Siebeck, 2012) 9-10. Analogies can be drawn from inter- and transdisciplinarity in gender studies, Susanne Baer, 'Interdisziplinierung oder Interdisziplinarität? – Erfahrungen mit Geschlechterstudien an der Humboldt Universität Berlin' in Alexandra Stäheli & Caroline Torra-Mattenklott (eds), *Eine Frage der Disziplin – Zur Institutionalisierung von Gender Studies* (Zürich: UniFrauenstelle 2001) 39; See also Heike Kahlert, Barbara Thiessen & Ines Weller (eds), *Quer denken – Strukturen verändern – Gender*

assesses the affinity between the legal concept and a historically specific idea as a source of signification or significance, while the latter seeks to unveil hermeneutically, namely through interpretation[252], another understanding of the meaning of human dignity, that is, what it is in relation to how (and why) it operates (as it does) in law, its content and form, substance and function, signification and significance[253]. The former turns for answers to the idea's philosophical background. The latter aspires to offer philosophical grounds for an original, genuinely affirmative stance towards "something missing"[254], rather than supplement the state of the art re human dignity in the history of ideas. Insofar as I turn to philosophy as an auxiliary source of insights for looking at law, the present project could be perceived as "interdisciplinary", "multidisciplinary"[255] or "transdisciplinary"[256]. To the extent that this argument seeks to advance another understanding of the law of human dignity through a hermeneutic and literary approach, namely methodology that transcends disciplinary boundaries in that it centers on language, that is, an elemental layer of meaning, it can be designated a transdisciplinary enterprise.

Studies zwischen den Disziplinen (Wiesbaden: VS Verlag für Sozialwissenschaften, 2005); Susanne Baer, 'Rechtswissenschaft' in Christina von Braun & Inge Stephan (eds), *Gender-Studien – Eine Einführung* (2nd edn, Stuttgard, Weimar: Metzler Verlag, 2006) 149; Susanne Baer, 'Interdisziplinäre Rechtsforschung – Was uns bewegt' (2010) *FS 200 Jahre Juristische Fakultät* 917; Susanne Baer & Antje Lann Hornscheidt, 'Transdisciplinary Gender Studies: Conceptual and Institutional Challenges' in Rosemarie Buikema, Gabriele Griffin & Nina Lykke (eds), *Theories and Methodologies in Postgraduate Feminist Research: Researching Differently* (New York: Routledge – Taulor & Francis Group, 2011) 165

[252] Gadamer, *Truth and Method* (1975, 2004) 390 ["[…] *language is the universal medium in which understanding occurs. Understanding occurs in interpreting.* […] All understanding is interpretation, and all interpretation takes place in the medium of language that allows the object to come into words and yet is at the same time the interpreter's own language."]

[253] See Ferdinand de Saussure, *Course in General Linguistics* (Charles Bally ed, Charles Bally, Albert Sechehaye & Albert Riedlinger trs, Peru, Illinois: Open Court Publishing, 1986) [Distinguishing between value and signification, Saussure emphasizes that terms are not isolated from their system, and one should start from the interdependent whole and analyze it to get to the terms. Saussure's structural linguistics emphasize the function and value of terms, namely consider terms as more than the union of sound to concept.]

[254] This approach is, hence, not an expression of polemics against the terms of the existing dialogue in doctrine; rather, it aspires to be an enhancement of the legal discourse to date.

[255] See Hilgendorf (2010) 913, 914 [Interdisciplinarity is defined as the cooperation of researchers coming from different disciplines in a common project, while multidisciplinarity or pluridisciplinarity is the mere "side-by-side" co-occurrence of different disciplines within a project]. Legal philosophy is concerned with the question whether the practice of law is right in the sense of just, ethical, and justifiable. Far from being a legal philosophy enterprise, the present analysis employs philosophical insights to engage in a hermeneutic and literary approach to law to portray its practice. See Baer, *Rechtssoziologie* (2011) 25

[256] Transdisciplinary approaches transcend rigidly demarcated disciplinary boundaries impeding the advancement of knowledge. See Mittelstraß, *Wissen und Grenzen* (2001) 89, 93 [the instrumentality of transdisciplinarity]; Hilgendorf (2010) 913, 915; Baer, *Rechtssoziologie* (2011) 53 [Interdisciplinary and transdisciplinary have a stronger potential of breaching presuppositions, bias, stereotypes, prejudice, fear of what is strange and other.]

Premising the reasonableness of the research questions on the empirical observation of *de facto* ambiguity and controversy as indications of 'something missing', minding the normative and social context of practice, and legal texts' 'own voice', referring to the FCC as the 'self', touching on legal actors' competence and responsibility, and on the coincidence of the human being and the institution in the role of the judge, all have implications of interest to legal sociology or cultural studies. Hermeneutics and literary criticism could fall under the rubric of cultural studies[257] or Law as Literature[258] within the Law and Literature movement[259], and certainly border on cultural studies' discourse analysis[260] and cultural criticism[261], the concept's cultural history[262], semantics, and theology.[263]

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[257] Binder & Weisberg, *Literary Criticism of Law* (2000) ix ['Literary studies have become 'Cultural Studies,' applying the methods of the humanities to the subject matter of the social sciences to reveal and interpet a 'social text.' The literary criticism of law […] should be seen as part of this larger development within literary studies.']

[258] ibid ['[…] the use of the methods of literary criticism in understanding and evaluating laws, legal institutions, and legal processes […].']

[259] ibid 3 [The relevance of Law and Literature to the present enterprise of inquiring into 'produced meaning' in the mobilization of human dignity language in FCC jurisprudence is traced in the goals of early Law and Literature scholars, who 'set themselves the twin tasks of defending judicial discretion and informing its exercise with Kantian liberal values.' The dawn of the Law and Literature movement was marked by characterizing 'legal argument and judgment as interpretive activities necessarily affording their practicioners wide latitude for creativity, but nonetheless constrained by craft values that were unltimately aesthetic […]' and by associating aesthetic concerns with the empathetic sensibility of legal actors 'as a restraint on and reproach to what they saw as the heartless utilitarianism of the new legal economics.']; Cf. Richard Posner, *Law and Literature: A Misunderstood Relation* (Cambridge, MA, London, England: Harvard University Press, 1988) [criticism]

[260] See Baer, *Rechtssoziologie* (2011) 264 [discourse analysis in cultural studies]; Distinguishing between my methodological approach and cultural studies' discourse analysis is compelled by their close resemblance. Engaging in discourse analysis, namely seeking certain formations in the text of laws, or courts' judgments, would require associating the findings of inquiry with constitutional history and culture, i.e. motifs and stereotypes distinct to the particular cultural context. For instance, I would have to demonstrate responsiveness to what it means, culturally, to be a prisoner, a transsexual, or a foreigner in Germany. Scientific answers to such questions presuppose exhaustive surveyance of the cultural context of 'othering' in Germany. Discourse analysis of law is also occupied with how certain core legal terms, such as human dignity, are treated in different legal texts. The proximity of this project to mine is obvious. Still, discourse analysis would probably aspire to treat the identification of patterns of human dignity as a legal concept systematically as a historically evolving phenomenon, in the sense of cohesively tracing the evolution of the concept in time and in different kinds of legal texts. The interpretative task undertaken here is restricted to scrutinizing an indeed restricted, yet illustrative subtotal of seminal human dignity FCC decisions, rather than all, or a representative subtotal. I approach a collection of historical instances that are exceptionally celebrated in legal literature as human dignity case law, while trying to be contextually and comparatively relevant. No systematically constructed cultural argument is furthered here.

[261] Binder & Weisberg (n 257) 18 ['The most promising literary criticisms of law are not particularly aimed at defending legal interpretation against majoritarian politics or defending human dignity against utilitarian rationality. Instead they interpet law as a cultural datum and analyze legal processes as arenas for generating cultural meaning. In such 'cultural studies' […] the stable self-sufficient persons of Kantian ethics give way to a more complex and contingent picture of the self.']; ibid 19 [Cultural criticism rejects the dichotomy between the literary and the instrumental analysis in contemporary legal discourse maintained in Law and Literature.]; ibid 26 ['While the different genres of criticism portray law as the composition of different kinds of artifacts, each portrays law as a practice of composition;

The 'human' component of 'human dignity' is, substantively, a *topes* across disciplines, just as hermeneutics and literary criticism are integral to the production of meaning regardless of the disciplinary and institutional realm within which this is performed. Research questions are not tackled through systematic treatment of human dignity practice in law as a sociological phenomenon, nor by seeking to draw scientific conclusions from a comprehensive assessment of the cultural phenomenon of human dignity in German constitutional law and jurisprudence[264], nor from the composition of the cultural setting of FCC jurisprudence, nor, finally, by means of semantic analysis of the term 'human' and the composed term 'human dignity'. As regards the affinity of this project to semantic analysis, it should furthermore be noted, that, while the portrayals performed are of semantic value since they propose an understanding of language, they are literary approaches rather than systematic semantic accounts. Moreover, the hermeneutic approach, while intersecting in certain respects with the purpose of legal hermeneutics as defined by Gadamer, namely 'not to understand given texts, but to be a practical measure filling a kind of gap in the system of legal dogmatic'[265], is not identified with this more specific enterprise here. The conceivable parallel readings of the thesis affirm the felicity of the 'oceanic feeling' metaphor and the inherent multi-dimensionality of the subject matter on the one hand, while hinting at the lurking pitfall of methodological insufficiency of any single, reductive approach on the other. These clarifications, at this early point, are deemed indispensible to the overall economy of the succeeding analysis.

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and the different accounts they give of the practice of literary composition exhibit a certain family resemblance: each can be described as a process of appropriating and reshaping old materials.']

[262] See Wetz, *Illusion Menschenwürde* (2005) 14 ff.

[263] The perplexity of forcing adherence of such methodological approaches to a common rubric should be noted here. For instance 'hermeneutics', or 'literary criticism' could be classed as one strand of the Law and Literature, specifically Law as Literature, movement. At the same time the strand of 'hermeneutics' *per se* grants wide latitude to those availing themselves of methodological approaches implied therein. One can claim that wherever meaning is produced, hermeneutics is practiced; or define 'hermeneutics' as 'historical hermeneutics' and draw on historicity and the process of the critical circle as ensued from the work of Edmund Husserl, Martin Heidegger, Hans Georg Gadamer, or Friedrich Schleiermacher – just to mention a few of the prominent names in this theoretical discourse. See Hoy, *The Critical Circle* (1982); Likewise, Law and Literature encompasses radically diverse methodological approaches to law, ranging from narrative and poetics, to deconstruction, postmodernism, and philosophy of language. For present purposes, the hermeneutical and literary approach to the law of human dignity plainly denotes the emphasis on texts as sources of meaning and representations of (a) reality.

[264] See James Q. Whitman, 'On Nazi "Honor" and the New European "Dignity"' (2003) 243, 246 ['I want to ask, not about the *philosophy* of dignity, but about the *culture* of dignity – to ask what it is that has made "dignity" a value that seems meaningful and important to ordinary Europeans. As we shall see, inquiring into the sources of the culture of "dignity," rather than the philosophy, puts the Nazi era in quite a new light.']

[265] Gadamer, *Truth and Method* (1975, 2004) 321

The hermeneutic and literary approach to law is evident in the evolution of the argument as a whole, as well as in each distinct part of the analysis. The structure of the inquiry could be branded teleological[266], 'the emerging of the core meaning' in Chapter One being expounded only later in tackling the practice of the legal concept in FCC jurisprudence in Chapter Two.[267] Chapter One sketches out three possible stories of 'something missing', three philosophical understandings of how human dignity is practiced in law, that is, distills insightful conceptualizations of themes crosscutting the legal discourse on human dignity from renowned philosophical works, to enable a different portrayal of the concept's practice as documented in selected legal texts. In that sense, the hermeneutic project undertaken pertains to interpretation as explanation.[268] The analysis in Chapter Two is occupied with seminal instances of human dignity in FCC judicial practice, indeed presently the most elaborate constitutional court jurisprudence on the law of human dignity, and discussed extensively in both continental-European and Anglo-American legal scholarship.

In rereading formative cases from FCC jurisprudence through the lenses delineated in Chapter One, I interpret texts as mirrors reflecting – to be sure, just one aspect of – human dignity practice. Comparative perspectives, drawing on positive law and case law from international, European (EU) and other national constitutional orders[269], are included to signify the potential reach of philosophical insights put forward in Chapter One as ways of understanding constitutionalism beyond the state portraying practice beyond the German example.

This book is written for students and scholars of law, with the intent to offer a philosophically grounded understanding of the foundations of the law of human dignity in Chapter One, and to trigger interaction between or transcendence of

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[266] See also Palmer (1969) 22 ['The *telos* of the process [of enunciation] is not to move the emotions (poetics) or to bring about political action (rhetoric) but to bring understanding to statement.']

[267] Lebech (2009) 20

[268] Palmer (1969) 20 ['Interpretation as explanation emphasizes the discursive aspect of understanding; it points to the explanatory rather than expressive dimensions of interpretation. Words, after all, do not merely *say* something […]; they explain something, rationalize it, make it clear. […] The cryptic messages from the oracle at Delphi did not interpret a preexistent text; they were "interpretations" of a situation. (The messages themselves required interpretation.) […] They brought into a verbal formulation the "meaning" of a situation; they explained it, sometimes in words that concealed as much as they revealed. […] Thus while in one sense the oracles simply said or enunciated, as explanation they moved toward a second moment of interpretation – to explain or account for something.']

[269] Reference and discussion in German, continental-European, and Anglo-American legal literature on human dignity are the criteria guiding the selection of human dignity manifestations in positive law and case law employed in the analysis.

disciplinary boundaries[270] in understanding how the law of human dignity is practiced, in Chapter Two. Rather than postulating answers, this affirmative stance towards the dual sense of 'something missing' aims to identify language requiring further critical reflection and to raise questions through three alternative portrayals of the practice of the law of human dignity in FCC jurisprudence. The points highlighted are opportunities and impetus for further inquiry within the disciplines of law, sociology and cultural studies, and welcome comparative approaches to employ the introduced model. General readers will receive a non-mainstream glance at seminal instances of FCC jurisprudence. The non-mainstream character of this approach translates essentially into exceeding and challenging the boundaries of legal doctrine [*Rechtsdogmatik*] on the basis of their insufficiency as sources of insights for understanding and thereby enhancing the practice of law, particularly of the law of human dignity.[271] Significantly, far from claiming that the present reading is pertinent to the challenges of everyday practice, it nevertheless sensitizes[272] practitioners as to how human dignity language is mobilized in law.

The practice of the law of human dignity in FCC jurisprudence and German legal doctrine presents unquestionably one of the most sophisticated, persistent and astute examples of mobilization. The German legal discourse may seem at times unwieldy and precise to the extent that it excludes correspondence to the Anglo-American literature. Bringing the two strands of discourse together and creating a model of hermeneutic and literary analysis grounded on divergent philosophical bases, aims to constructively interfere with the properness of that discourse. As a native Greek speaker I experience an alienation from both English and German, while for the native German speaker the use of English and the translations of the texts of

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[270] Binder & Weisberg (n 257) 5 [Binder and Weisberg identify an implicit logic shared by interdisciplinary importations, namely that '[t]he host and guest disciplines are in one sense interchangeable – each can illuminate the same phenomena.' They note: 'Yet their powers of illumination differ in quality and quantity. The guest discipline can correct the host's deficiencies, either improving it or displacing it altogether. To import literature into law is therefore to see the two enterprises as potential collaborators or competitors in the same enterprise.']

[271] See Dieter Grimm (ed), *Rechtswissenschaft und Nachbarwissenschaften* (2 Bde., 2nd edn, München: Beck, 1976)

[272] For accounts of how law and literature approaches sensitize legal actors practicing the law, see Binder & Weisberg (n 257) 3 ['[…] an empathetic sensibility that could alert the good lawyer or judge to the effect of legal decisions on the personhood or dignity of parties.']; ibid 4 [Of particular pertinence to the value of the *Subsistence Minimum Case* analysis *infra* '[…] a literary perspective could […] encourage the lawgiver to eschew mechanistic regulation in favor of an open-minded pluralism, to become an empathetic, inclusive, and imaginative architect of the common good.']

decisions have the effect of alienation, that is, the text 'speaks' to them in a manner that provokes per se critical reflection.

Alertness to gendered language is imperative in reading Chapter One and Chapter Two, that is, both the philosophical and the legal material. Philosophical insights are deduced predominantly from the work of male thinkers, Heraclitus as per Heidegger, Rancière, Wittgenstein, and Levin's. Side-by-side, female thinkers, chiefly MacKinnon, afford this analysis phrasing and framing patterns for the backbone questions, and enhance critical reflection on the texts under scrutiny in Chapter Two, in that they offer non-mainstream conceptualizations of law, thus a switch from traditional perspectives. Wherever 'gender alerts' arise in the succeeding pages, they are discretely indicated or more meticulously addressed. My personal disposition, as author and reader, to the range of instances of gendered language, bearing in mind that several of the texts studied presently are not recently written, is to contextualize gender alerts, tailor language carefully to avoid reproducing them, and 'restore', where possible, the inequality of assumed perspectives. For purposes of fluency, economy and intelligibility of the analysis and in view of the emphasis of this inquiry on concrete images corresponding to the *Menschenbild* in each case under scrutiny, I use the phrase 'the transsexual human being' in treating the *Transsexual I Case* in Chapter Two; it should be noted at the outset that I refer to human beings 'who are transsexuals', namely to an identity or, as presently framed, a manifestation of human being-ness, rather than an adjective, a label, an unattended to grouping of human beings under the term.

CHAPTER ONE

PHILOSOPHICAL ACCOUNTS OF HUMAN DIGNITY AS A LEGAL CONCEPT: THREE STORIES OF 'SOMETHING MISSING'

What does human dignity mean in law? In particular, how is it empty? The answer to this question is explored through the demonstration of the dialogue between three philosophical accounts: an ontological (Part A), a linguistic-analytical (Part B), and a phenomenological (Part C). The coming-into-being of human beings within the realm of law, specifically fundamental rights, can be rendered as the traversal of a limit, which brings about their ontological presence as subjects of fundamental rights within that realm and defines their relation to other human beings, termed 'the other' in the thought of Levin's, the world, and 'the Other', referred to as 'something always missing' in the presently told story. The traversal of limits eventuates in the *polemos* or dispenses. Practicing the law of human dignity scandalizes and irritates,[273] thus triggers and catalyzes the traversal of the limit. The transcendental character of human dignity surfaces most tangibly in relational portrayals. The linguistic-analytical and phenomenological accounts enable relational portrayals of practice. Premised on the linguistic and semantic relatedness of 'human' and 'human dignity' they show how the dual sense of 'something missing' is practiced in law whenever the law of human dignity is mobilized in legal texts.

The ontological account of human dignity is grounded on an enigmatic fragment by the Presocratic philosopher Heraclitus of Ephesus and a contemporary interpretation, feminist argumentation, and postmodern political theory concepts – granted, with special affinity to equality considerations – as sources of analogies. Ontological insights spark a penetrative, though somewhat crude, story of 'something missing' towards the end of advancing an 'ontological account' rather than 'an ontology' of human dignity. Thinkers resorted to in Part A do not restrict themselves to ontological remarks[274], which is why I should clarify at the outset that I only claim to turn to certain ideas and reflections found in their work to ground an ontological

[273] Baer, 'Menschenwürde zwischen Recht, Prinzip und Referenz – Enttabuisierungen' (2005) 571, 588
[274] As a matter of fact, Rancière explicitly resists the branding of his point on the whole as ontological. See Jacques Rancière, 'The Thinking of Dissensus: Politics and Aesthetics', in Paul Bowman & Richard Stamp (eds), *Reading Rancière: Critical Dissensus* (London, New York: Continuum International Publishing Group, 2011) 12ff.

perspective on the law of human dignity that, whilst composed and practiced, shall be in turn subject to critical reflection as regards its methodological appropriateness. Ontological insights set the foundations for the introduced model, yet fall short of grasping and communicating the relational and dynamic aspects of practice.

The linguistic-analytical account affords the figurative rendering of the texts of judicial decisions – indeed, partial reflections of judicial practice of the law of human dignity – as legal language games, and sets the foundations for the phenomenological account. The distinction between what can be 'said' and what can only be 'shown' in Ludwig Wittgenstein's *Tractates Logico-Philosophicus*[275], the ethical and the aesthetic as the transcendental, the appreciation of what the limit means drawing on the symbolic sense of tautologies, and the graph of the eye and the field of sight borrowed to depict where the metaphysical subject stands apropos the world are examples of the material that fleshes out the linguistic-analytical account of practicing the law of human dignity. 'Something missing' can be identified within the limits of our language as our world, understood however not in terms of pure logic, but rather as lived experience. 'Something always missing' refers to what lies beyond the limit. The legal language game represents the text of the judicial decision and corresponds to what is broadly referred to as the realm of law in the ontological account.

The phenomenological account is grounded in insights derived and analogies drawn from Emmanuel Levin's' *Totality and Infinity – An Essay on Exteriority* [henceforth, *Totality and Infinity*]. The thesis that the ethical precedes ontology

[275] The hermeneutic and literary methodological approach to law permits drawing on concepts and graphs in the early work of Wittgenstein, the *Tractatus Logico-Philosophicus* and, to a lesser extent, in the later thoughts collected in the *Philosophical Investigations.* Wittgenstein revisited and rejected to a considerable extent his early philosophy in his later work; what is more, the methodology and style of the former is significantly different to that of the latter. In the *Tractatus Logico-Philosophicus,* facts, that is, propositions of language, namely our world, are understood and evaluated as to whether they are sensible in view of the logical form beyond our world. Propositions and reality are pictorially related. In his *Philosophical Investigations*, language approximates lived experience. The perception of language thereby essentially departs from propositional logic: language games, and family resemblances among them, represent the variety of modes of practicing language and convey the dynamic evolution of language and all that is expressed in using it. Differences are, granted, foundational. The changes in the thought and style of Wittgenstein over time, however, do not affect the value of insights deduced from his early work in the present argument. The rigid and clear form and content of the *Tractatus Logico-Philosophicus* in fact serve, in methodological terms, the enterprise of setting up a model, a figurative representation of the practice of the law of human dignity. Substantively, the emphasis on the pictorial rather than representational nexus between propositions and reality is attuned to the notion of the *Menschenbild* as a conceptual pillar of this analysis. While cognizant of the shift, for the purposes of this argument, the analysis goes past it. See Anthony Clifford Grayling, *Wittgenstein – A Very Short Introduction* (Oxford: Oxford University Press, 2001)

indicates that Levin's' positions in *Totality and Infinity*, indeed abounding in language and variety of ideas, refer to pre-ethics, the ethics inhering in the practice of language and rendering the relation with the other in responsibility, generosity, hospitality, fraternity, solidarity and morality possible. Perceiving the other as Other denotes the transcendental quality of human being-ness. The humanism of the face-to-face encounter with the other, in other words of a relation instituted in language and motivated by desire for someone absolutely separated and other than the self, and the pluralism of the intersubjective space enhance this phenomenological portrayal of the transcendental.

The distinction between totality and infinity and, accordingly, between totalizers and infinitizers adds a further, phenomenological layer to the introduced model. Totality and infinity are two sides of the story of 'something missing' presently told; both are indispensable for delivering upon the commitment to humanism and the responsibility before God and human beings. The etherealness of ideas composing Levinas' account of pre-ethics is at the same time masterly rooted in lived experience. Language is the platform of the infinitizer, while vision of the totalizer; 'something missing' can be filled with meaning unfolding in real conversation with the other. The humane practice of the law of human dignity additionally rests on the breach of totalities and the possibility of transcendence towards infinity, 'something always missing'.

Critical reflection is the process that guarantees the humane practice of the law of human dignity; all three accounts furthered in Chapter One affirm this proposition and offer insights into the prerequisites of this process and its *modus operandi*. Understanding critical reflection as the processual meaning of the law of human dignity influences the interpretation of dominant language and time-honored concepts in legal theory and doctrine featuring in the cases under scrutiny in Chapter Two. The ontological account is a prelude to the linguistic-analytical and phenomenological accounts concerned with language as the foundation of society and communication. Together the three philosophically grounded accounts of the law of human dignity compose a multilayered, multifocal lens for looking at illustrative instances of FCC jurisprudence.[276]

[276] On the processual meaning of the law of human dignity see Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) 10 ['Den es kommt nicht nur auf das humanistische Ziel an; auch der Weg, auf dem das Ziel erreicht werden soll, muss human sein.']; Ontological conceptualizations imply the imposition of a

A. An ontological account of practicing the law of human dignity

The ontological 'account of' the law of human dignity laid out is, at the same time, exposed to critical reflection. The analysis demonstrates that the employment, single-handedly, of an ontological lens results in inadequate portrayals of the dynamic process[277] of practicing human dignity in law and warns about ontological traps[278] in treating this account as more than a prelude to the succeeding relational understandings. In German legal doctrine 'human' in 'human dignity', has, more than descriptive, prescriptive meaning.[279] In defending the descriptive meaning of the law of human dignity, that is, emphasizing the fact rather than just the law of human dignity, this study does not come into conflict with the dominant doctrinal position,

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status quo, and the portrayals ensuing from looking through an ontological lens are static. This is particularly evident in the doctrine of the protection of a core [*Kernbereichschutz*] of human dignity. Similarly to the space corresponding to the part of those who have no part in the thought of Rancière, the *Kernbeichschutz* according to Poscher, either physical or ideal, can cause the sealing of that space. Poscher opts for a relational account of the claim to respect. Similarly, the present hermeneutic and literary approach to the law of human dignity sets off from ontological considerations – acknowledging their insufficiency for the portrayal of the concept's practice – and enhances those with two relational accounts. See Poscher (2009) 269, 269; ibid 270ff. [*Kernbereichschutz,* the spatial – physical and ideal – rendering of the guarantee of human dignity]; See Hofmann, 'Die versprochene Menschenwürde' (1995) 104

[277] The dynamism of that process is, for instance, suggested in the requirement of concretization of claims to respect for human dignity. See Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 50; Arthur Schopenhauer, *The World As Will And Idea* (first published in 1818, R. B. Haldane & J. Kemp trs, 7th edn, London: Kegan Paul, Trench Trübner & Co., 1909, Project Gutenberg EBook 38427, release date: December 27, 2011) 447 [450] [Addressing the vagueness and indefiniteness of the Kantian proposition that 'Man must always be treated as an end, never as a means,']

[278] Rancière, *Dissensus* (2010) 67

[279] Hoerster (1983) 93, 96 [Human dignity is not an *a priori* determined concept, the violations or protection of which can be objectively established. The concept of human dignity is not of purely normative nature. Rather, it has a descriptive element, that is, the human being is by nature in priciple self-determined in freedom. Value decisions are required in the practice of the law of human dignity, in order to ascertain which forms of free human self-determination are *sittlich legitim* [morally legitimate].]; 96 fn 17 [Hoerster declares explicitly his reluctance towards associating the capability to self-determination in freedom as a descriptive account of the meaning of human dignity with metaphysical indeterminism. Minding that Hoerster does not elaborate on the grounds of his reluctance, no reaction can be offered here; to the extent, however, that his stance is relevant to the approach taken on at present, this remark is worth mentioning.]; Kunig, Art. 1, *GG Kommentar* (2012) para 1 ['[…] die Feststellung des Seins als nachdrücklichste Form einer Anmahnung des Sollens.']; The majority of voices in the doctrinal discourse on the inviolability [*Unantastbarkeit*] of human dignity in Art. 1 sec. 1 GG upholds the prescriptive – rather than descriptive – meaning of the proposition, thus reinforce leaning towards this understanding of "human" in the law of human dignity. See also Bernhard Giese, *Das Würde-Konzept. Eine normfunktionale Explikation des Begriffs Würde in Art. 1 Abs. 1 GG* (Berlin: Duncker & Humblot, 1975) 46; Krawietz (1977) 245, 255f.; Heinz Müller-Dietz, *Menschenwürde und Strafvollzug* (Berlin, New York: Walter de Grzuyter, 1994) 8; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 111-12 fn 36 ['Nach beiden Autoren [Nipperdey, Dürig] ist Würde unzerstörbares Faktum (Natur oder Wesen des Menschen) und gleichzeitig etwas, worauf ein subjektives oder wenigstens ein objektives, in jedem Fall aber verletzbares Recht besteht: Würde also etwas Wirkliches, was verwirklicht werden soll, unzerstörbare Natur des Menschen, auf die er ein Recht hat.']; Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 131; Gröschner & Lembcke (eds), *Das Dogma der Unantastbarkeit* (2010)

because it does not purport to be taking a stance in the doctrinal discourse. This hermeneutic and literary study intends to portray that – and how – the transcendental meaning of human dignity is practiced, and that practicing the meta-dimension of the law of human dignity is vital to ensuring law's humane mobilization[280]; it, thus, does not aim at detracting argumentatively from the doctrinal significance of prescriptive meaning.

Kunig notes that the ascertainment of being is the most emphatic form of a reminder of ought.[281] Who is that being? Are human beings human within the realm of law? The answer to that question depends on whether *ad hoc* instances of practice comply with the ought[282] implied in 'human'. The process of verifying or falsifying compliance presupposes 'something missing'. Understanding that 'ought' and the thereby justified constitutional guarantee apropos 'something missing' opens up a space for reflection through dissensus: Who is human?

Practicing human dignity language in law evokes – and, I argue, at once activates – law's humanism.[283] Methodological emphasis on the human factor in the texts analyzed here attests, at the same time, to the effort to trace such humanism. Heidegger understands the word 'humanism' processually and 'in its broadest sense', 'in its essence'[284].

> […] In that regard 'humanism' means the process that is implicated in the beginning, in the unfolding, and in the end of metaphysics, whereby human beings, in differing respects but always deliberately, move into a central place among beings, of course without thereby being the highest being.[285] Here 'human being'

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[280] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 33 ['Dass die Menschenwürde "unantastbar" ist, bedeutet nicht die Feststellung eines Faktums oder eine Beschreibung, wie die geschichtliche Erfahrung lehrt. Vielmehr *soll* die Menschenwürde nicht angetastet werden.']; Cf. para 8 ['Neben der christlichen gibt es eine humanistische Tradition, in der die Menschenwürde innerweltlich begründet wird. Schon die Beschreibung des "Faktums" Menschenwürde "als Fundament meines Vertrauens in mich selbst und in die anderen, auf das meine Existenz und Koexistenz im Bewusstsein prinzipieller Personalität und Solidarität überhaupt gründet", spiegelt noch die metaphysische Basis des Würdebegriffs. [footnotes omitted]']

[281] Kunig, Art. 1, *GG Kommentar* (2012) para 1

[282] ibid

[283] See Yannaras, *The inhuman character of human rights* (1998)

[284] Heidegger M, 'Plato's Doctrine of Truth' in ibid, *Pathmarks* (William McNeill ed, Thomas Sheehan tr, Cambridge: Cambridge University Press, 1998) 155, 181

[285] Cf. Nicolai Hartmann, *New Ways of Ontology* (first published in Stuttgart by W. Kohlhammer in 1949; with an Introduction by Predrag Cicovacki, New Brunswick, NJ: Transaction Publishers, 2012) 11 ['Unlike most traditional philosophers, Hartmann opposes the view that the real world is relative to man, in the sense that human beings are the highest and final purpose of the world order, and that all forms and relationships in the world must be ordered toward man. In Hartmann's view, just the opposite is the case. Even as a spiritual being, man cannot be understood without the world in which he finds himself, and it is necessary to define his essence from this point of view.']

> sometimes means humanity or humankind, sometimes the individual or the community, and sometimes the people [*das Volk*] or a group of peoples.[286]

Bearing in mind the linguistic and semantic overlapping[287] of the terms 'human being' and 'human dignity' or 'the dignity of the human being', the 'human' component, undoubtedly persistently present in the concept's course in the history of ideas[288], is first considered separately. The 'human' component alludes to law's *Menschenbild*, namely to the human image or the portrayal of human beings in law. The ontology of human beings, as mirrored in texts, is of pictorial form, a *Menschen-bild*. This image should be self-determined in light of the law of human dignity.[289]

The focus on human being-ness reflects an anthropocentric metaphysics. The insight that humanism signifies a process spurs the analysis on to inquire into the character of that process. The strong presumption that the law of human dignity and fundamental rights encapsulate law's humanism feeds on the values they deliver and evinces in the granted higher legal status; yet, precisely for that reason, fundamental rights present an impeccable 'cloak of force' [290]. This is why the substantiation of humanism in practicing the law of human dignity should be persistently subject to critical reflection and actively verified on a case-by-case basis.

> What is always at stake is this: to take 'human beings' who within the sphere of a fundamental, metaphysically established system of beings are defined as *animal rationale,* and to lead them, within that sphere[291], to the liberation of their possibilities, to the certitude of their destiny, and to the securing of their 'life'. This takes place as the shaping of their 'moral' behavior, as the salvation of their immortal souls, as the unfolding of their creative powers, as the development of their reason, as the nourishing of their personalities, as the awakening of their civic sense, as the cultivation of their bodies, or as an appropriate combination of some or all of these 'humanisms.' What takes place in each instance is a metaphysically determined revolving around the human being, whether in narrower or wider orbits. With the fulfillment of metaphysics, 'humanism' (or

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[286] Heidegger (n 284)
[287] Ludwig Wittgenstein, *Philosophical Investigations* (first published in 1953, P. M. S. Hacker & Joachim Schulte eds, G. E. M. Anscombe, P. M. S. Hacker & Joachim Schulte trs, revised 4th edn, Oxford: Wiley-Blackwell, 2009) 5e ['Every word has a meaning. The meaning is correlated with the word. It is the object [*Gegenstand*] for which the word stands.']
[288] Wetz, *Illusion Menschenwürde* (2005) 14ff.
[289] Köhne (2004) 285, 287 [*Selbstdarstellung*]
[290] Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (1989) 237
[291] The phrase 'within that sphere' can be viewed as an indication of a totality structure (see *infra* under Part C).

> in 'Greek' terms: anthropology) also presses on to the most extreme – and likewise unconditioned – 'positions'.[292]
> For this is humanism: meditating and caring, that human beings be human and not inhumane, 'inhuman,' that is, outside their essence. But in what does the humanity of the human being consist? It lies in his[293] essence.[294]

Cautious of the didactic tone in the least – if not underlying paternalism – in Heidegger's conception of humanism[295], availing nonetheless ourselves of the *supra* definition initiates an understanding of the abstract idea of humanism. Heidegger identifies systemic premises to metaphysics, enumerates various manifestations of human beings' unfolding[296], and communicates a concrete criterion for identifying and verifying whether law's practice accords with law's anthropocentrism, namely the ascertainment of 'meditating and caring, that human beings be human', in other words attuned to their essence. Four remarks are deemed crucially important in proceeding with the construction of a philosophically grounded model to approach the practice of the law of human dignity.

First, attention should be drawn to the spatial restriction on the unfolding of human beings 'within the sphere of a fundamental, metaphysically established system of beings'. Does this phrasing suggest the subsumption of human being-ness under a totality structure?[297] Second, transposing the various specified 'humanisms', as Heidegger calls them, to the realm of law could lead to state paternalism[298] as regards the concretization of what it means for a human being to be human. Third, according to Heidegger, the human being occupies a central position not only in a metaphysically established system, but also in a metaphysically determined dynamic process, namely one 'revolving around the human being, whether in narrower or wider orbits'. Fourth, 'inhuman' translates into being outside one's essence. Invoking the philosophical connotations of 'human' in 'human dignity' triggers anew the

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[292] Heidegger, 'Plato's Doctrine of Truth' 155, 181
[293] Gender alert!
[294] Martin Heidegger, 'Letter on Humanism' in ibid, *Pathmarks* (first edition 1949, William McNeill ed, Frank A. Capuzzi tr, Cambridge: Cambridge University Press, 1998) 239, 244
[295] On state paternalism see *infra* the analysis of the *Abortion I Case* (see *infra* under Chapter Two, Part B).
[296] See the word '*entfalten*' [to unfold] in BVerfGE 45, 187 (227) (1977) [*Life Imprisonment Case*].
[297] The notion of totality is elaborated on *infra,* under the phenomenological account in Part C.
[298] See Henning v. Olshausen, 'Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?' (1982) *NJW* 2221

question about who the human being is. Dealing with this interrogative demands de- and reconstructive disobedience to disciplinary boundaries.[299]

Who is the human being? Diverse allusions to the meaning of this ontological-metaphysical question[300], and a range of possible responses are conceivable[301] and certainly nuanced by motivations underlying this interrogative and its theoretical and methodological framing. That said, the promise carried by this opening question to spark an inquiry into the meta-dimension and *Menschenbild* of law is hardly far-fetched. The question expresses the desire to explore different manifestations of human being-ness, for instance existence, essence or identity; unless delineated it can release the Winds of Aeolus. Baer notes, '[w]ho the human being is and what follows from it, is controversial everywhere.'[302] The abundance of theoretical and empirical scholarly approaches across disciplines on each of the connoted manifestations of the human being, which can be attributed to the question's multi-signification and high degree of abstraction, gives an inkling of what is *enjeu* in exploring and laying out an ontological account of human dignity in law.

Who is the human being in law? The question might seem at first glance redundant or utterly provocative; is it not self-evident who the human being is within the realm of law? Catherine MacKinnon's efforts towards a feminist theory of the state are a source of insight into the imprint of law's *Menschenbild* on being a woman, and conversely the influence of the reality of women on the *Menschenbild* of law. For present purposes, MacKinnon's theoretical endeavor allows for drawing analogies to elucidate the practice of human dignity as a legal concept. Ontological

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[299] An interesting insight into the value of 'contesting disciplinary boundaries' can be deduced from a comment on how the philosophy of Jacques Rancière refuses 'the mastery and authority of methodological and disciplinary territory.' By challenging disciplinary boundaries 'for producing knowledge about politics […] Rancière's work each time seeks to reassert the equality of the democratic subject of history with the authoritative voice of the historian or philosopher'. In Paul Bowman & Richard Stamp, 'Introduction: A Critical Dissensus', in Paul Bowman & Richard Stamp (eds), *Reading Ranciere: Critical Dissensus* (London, New York: Continuum International Publishing Group, 2011) xiii; Alex Thomson, 'On the shores of history' in Paul Bowman & Richard Stamp (eds), *Reading Ranciere: Critical Dissensus* (London, New York: Continuum International Publishing Group, 2011) 200, 205

[300] The question is ontological-metaphysical in the sense that it is occupied with the meaning of being *qua* being. Despite the broad substantive scope of ontology, and the acknowledged elusiveness of definitions of metaphysics as a philosophical strand, this analysis is confined to philosophical insights re the meaning of the human being as such.

[301] The origin from human beings is a most celebrated response to the question. Cf. Jan Ziekow*, Über Freizügigkeit und Aufenthalt - Paradigmatische Überlegungen zum grundrechtlichen Freiheitsschutz in historischer und verfassungsrechtlicher Perspektive* (Tübingen: Mohr Siebeck, 1997) 378; Kunig, Art. 1, GG Kommentar (2012) para 12 [Commenting on'Mensch ist, wer von Menschen gezeugt wurde.']

[302] Baer, *Rechtssoziologie* (2011) 104; ibid 107 [controversy]

considerations[303] are central in her early and more recent work. Most importantly, transposing the essence of her arguments to this inquiry surely suggests: who is 'human', who really counts as 'human', is never self-evident.

> Law actively participates in [the] transformation of perspective into being. In liberal regimes, law is a particularly potent source and badge of legitimacy, and site and cloak of force. The force underpins the legitimacy as the legitimacy conceals the force. When life becomes law in such a system, the transformation is both formal and substantive. It reenters life marked by power.[304]

The chosen phrasing, 'law's *Menschenbild*', evidently implies law's[305] dominion over the meaning of the *Menschenbild*. MacKinnon's remarks capture by analogy how this dominion eventuates. MacKinnon asks in 1989 'What really, is a woman?'[306], and in 2006 'Are women human?'[307] Both questions are of penetrative rhetorical force[308]; are they also ontologically important? The latter explicitly casts the focus on women's human being-ness, an issue explored further later on in the analysis of the FCC *Abortion I Case* in Chapter Two.

Who is the human being? Heidegger famously treats the question in his interpretation of the Presocratic philosopher Heraclitus. In *An Introduction to Metaphysics*, Heidegger observes:

> Who the human being is, according to the word of Heraclitus, first comes forth (*edeixe,* shows itself) in the *polemos*[309]*,* in the

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[303] MacKinnon, *Toward a FTS* (1989) 237 ['A jurisprudence is a theory of the relation between life and law. In life, "woman" and "man" are widely experienced as features of being, not constructs of perception, cultural interventions, or forced identities. Gender, in other words, is lived as ontology, not as epistemology.']

[304] ibid

[305] The personification of law rests on the correspondence of actual human beings to the institutional dimension of legal actors.

[306] MacKinnon (n 303) 38

[307] MacKinnon, *Are Women Human?* (2006) 41 ['The Universal Declaration of Human Rights defines what a human being is. In 1948, it told the world what a person, as a person, is entitled to. It has been fifty years. Are women human yet?']; ibid 7 ['[…] the spread and effectiveness of international equality rights provide sensitive and striking indicators of women's progress in becoming human in the legal sense.']; ibid 9 ['As more and more of the substantive reality of women's deprivation of humanity has been reflected in law, recognition of sex equality as a preemptory international norm has advanced.']

[308] ibid 41ff. [MacKinnon poses a series of 'If women were human, would…?' questions.]

[309] Heraclitus, fragment 53, *πόλεμος πάντων μὲν πατήρ ἐστι, πάντων δὲ βασιλεύς, καὶ τοὺς μὲν θεοὺς ἔδειξε τοὺς δὲ ανθρώπους, τοὺς μὲν δούλους ἐποίησε τοὺς δὲ ἐλευθέρους;* Charles H. Kahn, The Art and Thought of Heraclitus – An edition of the fragments with translation and commentary (Cambridge: Cambridge University Press, 1979) [War is father of all and king of all; and some he has shown as gods, others men; some he has made slaves, others free]; note to the translation, Kahn, ibid 25

> disjunction of gods and human beings, in the happening of the irruption of Being itself.[310]

'Irruption' grasps and transmits how forcibly the disclosure of being occurs. Speaking of 'the disjunction of gods and human beings' can connote, first, the separation of 'human beings', who are essentially particulars and concretely[311] 'here', from 'gods', understood as universals[312] and abstractly[313] 'beyond'. The disjunction of universals and particulars[314] underlines the appropriateness of scrutinizing the ontology of instances of human being-ness *ad hoc*[315]; indeed, as noted *supra*, there is an abundance of alternative images of who the human being is in the practice of law[316]. Second, an analogy can be drawn between the notion of *polemos* or war and the tension between particulars and universals. This tension submits to different understandings: rethinking 'the distinction drawn since the Enlightenment between the universal and the particular was revealed to be false, because what had been called universal was the particular from the point of view of power.'[317] Their disjunction is a

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[310] Martin Heidegger, *Introduction to Metaphysics* (originally published: *Einführung in die Metaphysik* in Tübingen by Max Niemeyer Verlag in 1935; Gregory Fried & Richard Polt trs, New Haven: Yale University Press, 2000) 149

[311] Gadamer, *Truth and Method* (1975, 2004) 316 ['[…] Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness. […] Clearly legal hermeneutics finds its proper place here. The law is always deficient, not because it is imperfect itself but because human reality is necessarily imperfect in comparison to the ordered world of law, and hence allows of no simple application of the law.']

[312] Different philosophers interpret the polemics of the term 'universal' differently, and this pertains to the term as used in the philosophical accounts in this thesis.

[313] Köhne (2004) 285, 287 [An 'abstract human dignity' is incompatible with the the Basic Law]

[314] The multifaceted phenomenon of the practice of law – particularly of the law of human dignity, at once general and casuistic – is imbued with the tension between universals and particulars, or whole and parts. Methodologically, the expressive conception of literature is particularly apt to revisiting particulars. See also Friedrich Schleiermacher, 'Manuscript 3 – Hermeneutics: The Compendium of 1819 and the Marginal Notes of 1828' in Heinz Kimmerle (ed), James Duke & Jack Forstmann (trs), *Hermeneutics: The Handwritten Manuscripts* (Missoula, Mon.: Scholars Press, 1977) 95, 113 ['Complete knowledge always involves an apparent circle, that each part can only be understood out of the whole to which it belongs, and vice versa.']; On *circulus in probando* in Sextus Empiricus, see Mills Patrick, *Sextus Empiricus and Greek Scepticism,* 55

[315] Gadamer, *Truth and Method* (1975, 2004) 309 ['[…] discovering the meaning of a legal text and discovering how to apply it in a particular legal instance are not two separate actions, but one unitary process.']

[316] Understanding the law of human dignity presupposes the distinction between abstract universals and concrete particulars. In that sense, the distinction is part of the concept's meaning. At the same time, human dignity language bridges the pre-state and meta-constitutional character of human dignity and the subjective right conceptualizations. Hufen (2004) 313, 314-15; See also Stöcker (1968) 685, 685 ['Erst dann lichtet sich der mit dem Wertphilosophen aufgeladene Nebel, wenn die Kasuistik der Vorschrift entfaltet wird.']; 686 [the critical aspect of the concept of human dignity carries the promise of reconciling the abstract with the concrete]; Spellbrink (2011) 661, 662 [the fundamental problem of Art. 1 GG is the misunderstanding between the highly abstract guarantee of and the concrete claim to human dignity; danger of rendering the legal concept '*kleine Münze*']

[317] MacKinnon, *Are Women Human?* (2006) 46

prerequisite, most importantly, to the self-determination of human beings[318], which should, first, not be impaired and, moreover, should be fostered[319]. The 'irruption of Being', according to Heidegger's interpretation of Heraclitus, effectuates the disclosure of human being-ness[320]. The disjunction from 'gods' indicates the self-determined disclosure of the human being[321].

Each claim to human dignity asserts a particular image of who the human being is: potentiality and continuity are traits of the manifestation of human being-ness in unborn life, while self-determination and the development of personality in the pregnant woman; unless the hope of regaining freedom in the future is maintained, and a subsistence minimum in line with human dignity is guaranteed for those sentenced to life imprisonment, these human beings find themselves 'outside their essence', that is, the very meaningfulness of their human being-ness is challenged; the

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[318] Human dignity and/as self-determination or autonomy are/is dominantly discussed in the legal literature in light of the Kantian interpretation. The present hermeneutic and literary approach explores the meta-dimension of the law of human dignity, namely what is presupposed by the concept's application, rather than single substantive accounts of human dignity. See Hufen (2004) 313, 316

[319] Binder & Weisberg, *Literary Criticism of Law* (2000) 539 ['[…] the cultural criticism of law is part of the work – at once political and aesthetic – of choosing what kind of culture we hope to have and what kind of identities we hope to foster.']

[320] For present purposes, the existence and the essence of human beings are considered two logically distinct, yet ontologically correlative moments of being (*Seinsmomenten*). The nexus between *Dasein,* '[…] that something is existent and present […]', and *Sosein* '[…] how it is; its being a certain way […]' requires clarification. While Heidegger, his contemporary, focused predominantly on *Dasein*, Nicolai Hartmann specifically inquired into the relation of *Dasein* to *Sosein* as ontic manifestations of being. Hartmann found two stances in ontological theory essentially inaccurate: first, the association of essence with the ideal and existence with the real, and, second, the complete separation of essence and existence. Hartmann's insight that '*Sosein* cannot be identified with the ideal since every thing that is real is also a *Sosein*' and '*Dasein* is not identical with the real, since every ideal is also a *Dasein*' demonstrates the complexity of the relation and the arbitrariness of the two – thought of as mistaken – stances. Cicovacki presents Hartmann's account of the issues therein: '*Dasein* and *Sosein* are the two moments of the same being. The two terms can be logically differentiated, but *Dasein* and *Sosein* cannot be ontologically separated. Despite being deeply interwoven, there is no direct and tautological identity between *Dasein* and *Sosein*, even in the same thing.' Hartmann, *New Ways of Ontology,* 7-8

[321] Wittgenstein, *Tractatus,* (5.633) [The linguistic-analytical account of human dignity *infra* shall demonstrate how the world is our world, and our actions are determined, at the very fundamental level of language, by the self, the 'metaphysical subject', the 'philosophical I']; Thurner, interpreting the role of language as means for responding in Heraclitus, notes, 'Der Mensch bedarf der göttlichen Offenbarung nicht mehr, wenn er seine eigene Sprache als Orakelspruch zu hören vermag. Wird die inhaltlich bestimmte Aussage des Gottes durch das Phänomen der menschlichen Sprache also solcher ersetzt, erweist sich die Sprachlichkeit als eine für die Austauschbarkeit des göttlichen Orakels durch das menschliche Selbst konstitutive Voraussetzung. Wie die Untersuchung eines delphischen Spruches im genauen Hinhören auf die sprachliche Struktur dessen doppeldeutige Sinnmöglichkeiten erschließen kann, erkennt der Mensch sich selbst, indem er seine eigene Sprache auf die in ihr verbogenen Botschaften hin analysiert.' And commenting further on fragment B101 shows how the human being is the authority over meaning: 'Wenn Heraklits Denken darin seinen Ursprung hat, daß er sich selbst als ein Orakel vernimmt (Fragment B101), so konkretisiert sich dies in der Denkbewegung dadurch, daß er auf seine Sprache hört. Die Selbstsuche wird so zum Hören auf die eigene Sprache, weil der Mensch in dem Sinne seine Sprache ist, als er sich im Sprechen vollzieht und verwirklicht.' Martin Thurner, *Der Ursprung des Denkens bei Heraklit* (Stuttgart, Berlin, Köln: Verlag W. Kohlhammer, 2001) 206

human being-ness of transsexuals consists in the institution of a human image that reflects their unified *Physis* and *Psyche* in life within the realm of law; the non-objectification of innocent victims on board a hijacked aircraft stands for their human being-ness; finally, livelihood and the fulfillment of basic needs in accordance with human dignity of the most vulnerable in society guarantee their human being-ness.

When do we first realize that 'something is missing'? The proposition that human being-ness first comes forth in *polemos* applies analogically to the initiation of concrete images of human being-ness into law, specifically into the realm of fundamental rights, to wit, the recognition of human beings – individuals and groups – as bearers of a claim to respect and protection of human dignity.[322] The moment of human beings' coming-into-being within the realm of law, when, for instance, violations give rise to a constitutional claim to human dignity by individuals or groups as subjects of fundamental rights or activate the duty to protect on the part of the state, marks the beginning of perceiving them as present at the level of law, thus realizing that they were previously absent. Disclosure through *polemos* signals that 'something missing' once corresponded to a space within the realm of fundamental rights, namely the part reserved for those who have no part[323]. 'Something missing' as an inherent quality of human being-ness[324] constitutes also an aspect of the meaning of practicing the law of human dignity. Human dignity as a legal concept guarantees ontologically significant space, that is, 'something missing', within the realm of law's practice.[325]

The humane practice of the law of human dignity, more than ensuring the availability of – figurative and/or literal – *locus* for new subjects of fundamental rights in law, entails the observance of a certain process, namely critical reflection. To the extent that ontological portrayals are symptomatic of the establishment of a *status*

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[322] Admittedly, distinguishing between the ontological and phenomenological character of this assertion when it comes to the recognition of human beings as subjects of fundamental rights is difficult. Be that as it may, emphasis on the ontological dimension of coming-into-being, far from implying a stance of disregard for phenomenological implications, sets the stage for the ontological account of 'something missing' as an integral aspect of human dignity.

[323] Rancière, *Dissensus* (2010) 35

[324] Heidegger, 'Plato's Doctrine of Truth' 155, 181 [On the meaning of 'human being']

[325] Multiple and diverse concretizations of the abstract concept of human dignity are conceivable; be that as it may, in light of the presently advanced ontological account, the mediating, inventive and creative function of human dignity as a legal concept guaranteeing the availability of space for the establishment of new subjects within the realm of fundamental rights ensues from the concept's meaning understood holistically. The philosophical insights offered here hint at the meaning, the 'how' and the 'why', underlying the features of abstraction and universality; McCrudden (2008) 655, 721 f. ['Justifying the Creation of New, and the Extension of Existing, Rights']; Habermas, 'The Concept of Human Dignity' (2010) *Metaphilosophy* 464, 467 f. [inventive function]

quo[326] they could be misrepresenting this processual dimension of humane practice. That this account is substantively less elaborate a step towards the multilayered story of 'something missing' is due to the fact that ontological premises can merely serve as a prelude to relational philosophical grounds and cannot soundly portray the transcendental meaning of the law of human dignity. Be that as it may, the value of ontological insights put forward herein lies precisely in that they leave the question 'who the human being is' deliberately open[327], hence introduce an understanding of human beings *qua* beings that allows for overturning the *status quo*.

Rancière perceives of politics and aesthetics 'as forms of dissensus'[328]. A further link in the chain of hermeneutic syllogisms surfaces, namely the nexus between dissensus and the notion of *polemos*[329]. According to Rancière,

> […] the disruption that they [politics and aesthetics] effect is not simply a reordering of the relations of power between existing groups; dissensus is not an institutional overturning. It is an activity that cuts across forms of cultural and identity belonging and hierarchies between discourses and genres, working to introduce new subjects and heterogenous objects into the field of perception.[330]

Dissensus 'consists in the demonstration of a certain *impropriety* which disrupts the identity […]'[331]. The transcendental entails a surplus, an impropriety. Consensus[332], on the contrary, corresponds to 'the proper'. But, again, the 'proper' implies the 'improper'.[333] How does dissensus as *polemos* show who the human being

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[326] Bowman & Stamp, 'Introduction: A Critical Dissensus', in *Reading Rancière: Critical Dissensus* (2011) xv [The authors comment on Rancière's abstention from perceiving his work as an ontology Rancière's 'suspicion of insitutionalization and organization' is the weakness of his 'insistence on the emancipatory presupposition of equality.']

[327] Heidegger, *Introduction to Metaphysics*, 149 ['Who the human being is – for philosophy, the answer to this problem is not inscribed somewhere in heaven. Instead: […] 1. The determination of the essence of the human being is *never* an answer, but is essentially a question.']

[328] Rancière, *Dissensus* (2010) 1 [editor's introduction]

[329] Hoerster identifies dissensus regarding the 'morally legitimate' [*sittlich legitim*] particularly in those realms of life where the legitimate limits of self-determination in freedom lie. Hoerster (1983) 93, 95

[330] Rancière, *Dissensus* (2010) 2 [editor's introduction]; The delineation of legal actors', specifically judges' 'field of perception' is extensively discussed *infra*, in the linguistic-analytical account of the law of human dignity. It suffices to note at this stage of the analysis that there are ontologically – and phenomenologically – significant 'fields', and to explain that the 'field' of interest to this inquiry is law, in particular fundamental rights.

[331] ibid

[332] ibid ['The essence of consensus […] is the supposition of an identity between sense and sense, between a fact and its interpretation, between speech and its account, between a factual status and an assignation of rights, etc.']

[333] ibid

is?[334] Rancière poses a question, at the same time introducing another framing of the opening question: 'Who is the subject of the rights of man?'[335] Rancière observes, '[…] politics gets equated with power and power itself gets increasingly construed as an overwhelming historico-ontological destiny from which only a God can save us […]'[336]. In order to 'escape this ontological trap'[337] the subject of fundamental rights 'has to be re-worked'[338]. Rancière revisits the position of Hannah Arendt on the Rights of Man:

> […] either the Rights of Man are the rights of those who have no rights or they are the rights of those who have rights. Either a void or a tautology, and, in either case, a deceptive trick, such is the lock that Arendt builds. This lock is solid, however, only if we pay the price of sweeping aside the third assumption that escapes the quandary. This assumption can be stated as follows: the Rights of Man are the rights of those who have not the rights that they have and have the rights that they have not. [339]

Rancière distinguishes between rights as inscriptions[340], hence 'as such […] not merely the predicates of a non-existing being […]'[341], and 'rights of those who

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[334] See Butler, *Feminism and the question of postmodernism* (1992) 3, 13 ['[…] subjects are constituted through exclusion, that is, through the creation of a domain of deauthorized subjects, presubjects, figures of abjection, populations erased from view. […] Here it becomes quite urgent to ask, who qualifies as a 'who,' what systematic structures of disempowerment make it possible for certain injured parties to invoke the 'I' effectively within a court of law?']

[335] Rancière (n 330) 62

[336] ibid 67 [Rancière is apparently quoting Heidegger in the famous *Spiegel* Interview (1966).]

[337] ibid

[338] ibid

[339] ibid

[340] Geertz's argument on texts can enhance our understanding of the textual form of rights as inscriptions and, more generally, of the implications of focusing on the practice of the law of human dignity as an inscription in texts of positive law and case law discussed *infra*. See Geertz, *Local Knowledge* (1983) 31 ['The key to the transition from the text to text analogue, from writing as discourse to action as discourse, is, as Paul Ricoeur has pointed out, the concept of "inscription": the fixation of meaning. When we speak, our utterances fly by as events like any other behavior; unless what we say is inscribed in writing (or some other established recording process), it is as evanescent as what we do. […] The great virtue of the extension of the notion of text beyond things written on paper or carved into stone is that it trains attention on precisely this phenomenon: on how the inscription of action is brought about, what its vehicles are and how they work, and on what the fixation of meaning from the flow of events – history from what happened, thought from thinking, culture from behavior – implies for sociological interpretation. To see social institutions, social customs, social changes as in some sense "readable" is to alter our whole sense of what such interpretation is and shift it toward modes of thought rather more familiar to the translator, the exegete, or the iconographer than to the test giver, the factor analyst, or the pollster.']; 31 f. [methodologically significant point: 'Philology, the text-centered study of language, as contrasted to linguistics, which is speech-centered, [….] [serves] the end of producing an annotated edition as readable as the philologist can make it. Meaning is fixed at a meta-level; essentially what a philologist, a kind of secondary author, does is reinscribe: interpret a text with a text.']

[341] Rancière (n 330) 68 ['Actual situations of rightlessness may gainsay them, but they are not merely an abstract ideal, situated far from the givens of the situation. Instead they are part the configuration of

make something of that inscription, deciding not only to "use" their rights but also to build cases to verify the power of the inscription.'[342] The subject of fundamental rights on account of the above distinction 'bridges the interval between the two forms of existence of those rights'[343]. Subjects 'are not definite collectivities, but surplus names that set out a question or a dispute (*litigant*) about who is included in their count.'[344] This insight reinforces the doctrinal clarification that the subjective protective scope of Art. 1 sec. 1 GG encompasses each and every individual, not just the dignity of human beings or the dignity of humanity[345], thus law's *Menschenbild* is not to be defined. The openness of predicates is manifested in the *polemos*, disputes 'about what they entail, whom they concern and in which cases'[346].

In light of these considerations, a thinly veiled analogy is discerned between MacKinnon's question 'Are women human?', Rancière's 'Who is the subject of the rights of man?'[347] and the presently crucial ontological question 'Who is the human being?' Ultimately, are human beings human?[348] The subjective scope of the law of human dignity encompasses every human being[349], and, it follows, all conceivable particulars[350]. Ontologically significant 'surplus names' remain open for subjects

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the given, which does not only consist in a situation of inequality, but also contains the inscription that gives equality a form of visibility.']

[342] ibid ['At issue is not simply to check whether rights are confirmed or denied by reality, but to bring to light what their confirmation or denial mean.']

[343] Rancière, ibid 67; See also Wittgenstein, *Tractatus*(6.43)

[344] ibid 68

[345] Kunig, Art. 1, *GG Kommentar* (2012) para 17 ['Die Menschenwürde jedes Einzelnen ist geschützt, nicht (lediglich) die Würde "der" Menschen, also "der Menschheit".']; Fritz Münch, *Die Menschenwürde als Grundforderung unserer Verfassung* (Bocholt: Böckenhoff & Honsel in Komm., 1952) 8

[346] Rancière (n 330) 68

[347] ibid 62

[348] MacKinnon, *Are Women Human?* (2006) 3 ['Legally, one is less than human when one's violations do not violate the human rights that are recognized.']; See also Margalit, *The Decent Society*, 89 ['There are various ways of treating human beings as nonhuman: (a) treating them as objects; (b) treating them as machines; (c) treating them as animals; (d) treating them as subhuman (which includes treating adults as children).']

[349] Cf. Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 63 ['Andererseits kann die allgemeine Menschenwürdegarantie der Differenzierung zwischen Deutschen- und Menschenrechten […] nicht den Boden entziehen. Die "Privilegierung" der Staatsangehörigen verdankt sich nicht nur pragmatischen Erwägungen oder solchen der Tradition, sondern ist Ausdruck des fundamentalen Umstands nationalstaatlicher Garantie auch universeller Menschenrechte sowie des Zusammenhangs von privat-staatsabwehrender und politisch-demokratischer Grundrechtsausübung. […] Für das Grundgesetz bleibt des weiteren zu berücksichtigen, daß Nichtdeutsche nach herrschender Ansicht in weitem Umfang auf den sachlichen Gehalt der Deutschengrundrechte berufen können.']; See recent FCC jurisprudence expanding the subjective scope of the fundamental right to a subsistence minimum in line with human dignity to non-citizens, BVerfGE 132, 134 (2012) [*Asylbewerberleistungsgesetz*]

[350] Reference to 'particulars' indicates, for instance, women or children in international law, and, more generally, all conceivable individuals and groups as qualitative subtotals of 'every human being'.

coming-into-being through dissensus to avail themselves of in putting forward claims to human dignity.[351]

Hitherto, the meaning of the question 'who the human being is' within the realm of law has been elucidated by connotations of the opening ontological-metaphysical question and of certain illustrative phrasing and framing variations; by the insight that coming-into-being occurs in the *polemos,* namely the disjunction of gods and human beings, which allows the latter to practice self-determination, and involves tension between universals and particulars; and by reflections on when, besides how, the ontological presence of 'something missing' is first sensed, thanks to Rancière's thoughts on the political and the aesthetic character of dissensus. In understanding the ontology of the human being that trails the practice of human dignity in law, the ontological trap of treating a single definition as a *status quo* is assiduously avoided; quite the contrary, this ontological account indicates that the law of human dignity has a dynamic meaning.

Rather than seeking to ascribe certain content[352]*,* I further a hermeneutic argument about 'something missing' as an aspect of the meaning of law's *Menschenbild.* 'Something missing' is an ontological quality of human being-ness that trails the 'human' in 'human dignity', most crucially, as a legal concept. At this point in the analysis, due to the generic character of ontological insights, the dual

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[351] Just as 'freedom and equality are not predicates belonging to definite subjects' [Rancière (n 330) 68], so too – or, even more – the question of partaking in human being-ness is always left open. Then, one would wonder, why is the point of importance specifically with respect to the legal concept of human dignity? Two responses are necessary for the sake of clarity and intelligibility: First, the focus on human dignity constitutes an emphasis, a 'zooming in' aspiring to advance another understanding of the legal concept's meaning as practiced by legal actors, particularly judges. Freedom and equality rights are not ignored; on the contrary, the figurative rendering of the dynamics of the three concepts as forming a triangle of fundamental rights is endorsed and presumed; See Baer, 'Triangle' (2009) University of Toronto Law Journal 417; Second, the linguistic and semantic proximity of human dignity to the human being spark an inquiry into ontological grounds enhancing the nexus.

[352] In FCC jurisprudence and, more broadly, in German legal doctrine, the content of law's *Menschenbild* is not forced to conform to a particular philosophical or ideological strand. The only aspect of the *Menschenbild* defined is that it mirrors both the individual and the individual as a part of the community. This determination, however, can be read as denoting the processual rather than substantive meaning of the *Menschenbild*. See BVerfGE 4, 7 (15f.) [*Investitionshilfe*] ['Das Menschenbild des Grundgesetzes ist nicht das eines isolierten souveränen Individuums; das Grundgesetz hat vielmehr die Spannung Individuum - Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden, ohne dabei deren Eigenwert anzutasten. Das ergibt sich insbesondere aus einer Gesamtsicht der Art. 1, 2, 12, 14, 15, 19 und 20 GG. Dies heißt aber: der Einzelne muß sich diejenigen Schranken seiner Handlungsfreiheit gefallen lassen, die der Gesetzgeber zur Pflege und Förderung des sozialen Zusammenlebens in den Grenzen des bei dem gegebenen Sachverhalt allgemein Zumutbaren zieht, vorausgesetzt, daß dabei die Eigenständigkeit der Person gewahrt bleibt.']

sense of 'something missing' laid out, the *Leerstelle* simile and the meta-sense of emptiness designating 'something always missing', is not perceptible.

The documentation of 'something missing' as an ontological feature of human nature or *φύσις*[353] in philosophy goes back to Presocratic thought, specifically, for present purposes, to Heraclitus of Ephesus[354]. Kahn notes that the 'real subject' of Heraclitus 'is not the physical world but the human condition [*conditio humana*[355]], the condition of mortality'[356]. Thurner affirms the thematic dominance of and recurrent reference to the human being [*ἄνθρωπος,* Pl. *ἄνθρωποι*] in Heraclitian fragments[357]. Opposing the classification of Heraclitus, as Aristotle, under natural philosophers seeking to establish the material origin of all things[358], Kahn emphasizes the 'radical shift in perspective' marked by the aim of Heraclitus 'not to improve the Milesian cosmology by altering a particular doctrine but to reinterpret its total meaning'[359] focusing on the human being as such [*nach sich selbst*][360]. Heidegger contends that the correspondence between being and *φύσις*[361] is echoed in 'the great beginning of Greek philosophy, the first beginning of Western philosophy […]'[362], implying the Presocratics.

> And a much weaker, much harder-to-hear echo of the original φύσις that was projected as the being of beings, is still left for *us* when we speak of the 'nature' of things, the nature of the 'state', and the 'nature' of the human being, by which we do not mean the natural

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[353] Martin Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics, B, I', in ibid, *Pathmarks* (William McNeill ed, Thomas Sheehan tr, Cambridge: Cambridge University Press, 1998) 183, 183 ['The Romans translated φύσις by the word *natura. Natura* comes from *nasci,* "to be born, to originate," as in the Greek root γεν-. *Natura* means "that which lets something originate from itself."']
[354] The philosophy of Heraclitus of Ephesus, just as the cosmology of Thales, Anaximander, or Anaximenes of the Milesian school, belongs to Ionian Presocratic thought; Kahn (1979) ix ['His reflections upon the order of nature and man's place within it, upon the problems of language, meaning and communication still seem profound; and many of his insights will remain illuminating for the modern reader, not merely for the specialist in ancient thought.']
[355] See discourse in Thurner (2001) 187
[356] Kahn (n 354) 23
[357] Thurner (n 355) 204 fn 62
[358] ibid 204-205
[359] Kahn (n 354)
[360] Thurner (n 355) 205
[361] Heidegger (n 353) 229 ['But how should we think φύσις in the way it was originally thought? Are there still traces of its projection in the fragments of the original thinkers? In fact there are, and not just traces, for everything they said that we can still understand speaks *only* of φύσις, provided we have the right ear for it.']
[362] Heidegger (n 353) 229

> 'foundations' (thought of as physical, chemical, or biological) but rather the pure and simple *being and essence* of those beings.[363]

At the very core of the ontological account to human dignity stands the well-known, yet obscure[364] fragment 123 of Heraclitus of Ephesus: '*φύσις κρύπτεσθαι φιλεῖ*'[365], which should not be read in isolation, but rather as part of the human-centered thought of Heraclitus in its entirety.[366] The fragment is, as ensues from Thurner's interpretation, not only of ontological, but also of phenomenological relevance[367]. In the thought of Heraclitus *φύσις* is inextricably associated with *λόγος*[368]. This association enhances the disjunction of universals and particulars in the *polemos*; the universal *λόγος*[369], far from denoting a particular moment of reality [*Wirklichkeitsmoment*], is the concealed attunement among all things[370]. The concealed *λόγος* is constantly present in all manifested particulars coming forth in the *polemos*.[371] *Φύσις* etymologically derives from *φύεσθαι* in the sense of coming forth in life, growing and arising[372]. Since *φύσις* is linked to the universal *λόγος* concealed in all things as the root of all things beyond superficial appearances of particulars, *φύσις* also corresponds to the hidden.[373] Whoever divides [*zerlegt*] the *φύσις*, causes it to come forth in the unhidden[374].

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[363] Heidegger, ibid 183, 229 [Here Heidegger criticizes what he thinks of as non-essence, namely perceiving original Greek thinking, that is, Pre-Socratic thought, as 'philosophy of *nature*' in the sense of a 'primitive' 'chemistry'.] Cf. Wittgenstein, *Tractatus,* (2.024) ['Substance is what exists independently of what is the case.']; ibid (2.025) ['It is form and content.']

[364] Kahn (1979) 7 ['Heraclitus is not merely a philosopher but a poet, and one who chose to speak in tones of prophecy.']

[365] Heraclitus, fragment 123 [Nature loves to hide] in Kahn (1979)

[366] So proposes Thurner (n 355) 185 ['Im Fälle Heraklits sieht sich der Interpret mit einer Aufgabe konfrontiert, die sich ihm sonst bei kaum einem anderen Denker stellt: Aufgrund der fragmentarischen Gestalt der Überlieferungen besteht die Interpretation bereits darin, die zerstreuten heraklitischen Gedanken in einen Zusammenhang zu fügen.']

[367] Thurner, ibid 214 ['Der Prozeß der Bewußtwerdung des λόγος ist zugleich der Ursprung des Denkens im Sinne von dessen Selbstunterscheidung vom vorphilosophischen Selbstvollzug des Menschen. Wenn dieser in der Entdeckung einer unscheinbaren Gegenwart besteht, in der der λόγος zur Sprache kommt, entsteht das Denken bei Heraklit als eine Phänomenologie des Nicht-Erscheinenden.']; An analogy can be drawn between the concealed in Heraclitus and the absolutely other in Levinas (see *infra*).

[368] Thurner (n 355) 217; ibid 209 fn 75

[369] The *λόγος* can be paralleled to the logical form in Wittgenstein's *Tractatus Logico-Philosophicus* (see *infra,* Part B).

[370] Heraclitus, fragment B54, *ἁρμονίη ἀφανὴς φανερῆς κρείττων*; Kahn (1979) [The hidden attunement is better than the obvious one]

[371] Thurner (n 355) 215 ['Da der *λόγος* demnach nicht ein Wirklichkeitsmoment, sondern deren aller […] unscheinbare Zusammenfügung […] ist, wird er in der alles Geschehen beherrschenden Kraft […] seiner ständigen Gegenwart zugunsten der Vordergründigkeit des sich einander Abwechselnden und so in den Vorschein Drängenden […] übersehen.']

[372] See ibid 217 fn 91

[373] ibid 217

[374] ibid 218

> The diaeretic process [*dihairetisches Verfahren*] adopted by Heraclitus aims ultimately at a synthesis of the different moments of human experiential reality [*Erfahrungswirklichkeit*].[375]

Another grouping of fragment 123 together with fragments 18[376], 22[377], and 35[378] is proposed in Kahn's commentary, 'on the basis of their common imagery of searching, finding, being hard to find.'[379] At once, this intimates the epistemological difficulty of understanding *φύσις* and affirms the importance of openness as a feature of critical reflection.

> As grouped here, these four quotations deal with the difficulty of cognition from the side of the object. [...] the prize of wisdom hunted by philosophical goldseekers, is not simply there for the taking. Even if the *logos* is common to all, so that the structure of reality is 'given' in everyday experience, recognition comes hard. It requires the right kind of openness on the part of the percipient […]. And it requires inquiry and reflection – digging up a lot of earth and judging it with discretion. The 'gnosis' which Heraclitus has in mind is rational knowledge, and it has to be gained by hard work; it is not the miraculous revelation of a moment of grace. [380]

Heidegger[381], undoubtedly one of the most astute and controversial interpreters of Greek thought[382], proffered a penetrative translation[383] and an original hermeneutic approach[384] to fragment 123: 'being loves to hide itself'[385].

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[375] ibid 217-18

[376] Heraclitus, fragment 18, *ἐὰν μὴ ἔλπηθαι ἀνέλπιστον οὐκ ἐξευρήσει, ἀνεξερεύνητον ἐὸν καὶ ἄπορο*; Kahn (1979) [He who does not expect will not find out the unexpected, for it is trackless and unexplored]

[377] Heraclitus, fragment 22, *χρυσὸν γὰρ οἱ διζήμενοι γῆν πολλὴν ὀρύσσουσι καὶ εὑρίσκουσιν ὀλίγον*; Kahn (1979) [Seekers of gold dig up much earth and find little]

[378] Heraclitus, fragment 35, *χρὴ εὖ μάλα πολλῶν ἵστορας φιλοσόφους ἄνδρας εἶναι*; Kahn (1979) [Men who love wisdom (*philosopoi andres*) must be good inquirers (*histores*) into many things indeed]

[379] Kahn (1979) 105

[380] ibid

[381] Heidegger's approach to Greek thought is of both ontological and phenomenological significance. For present purposes the former reading is emphasized; Friedrich-Wilhelm von Hermann, 'Hinführung' in Günther, Hans-Christian & Antonios Rengakos (eds), *Heidegger und die Antike* (München: Verlag C. H. Beck, 2006) 10 [phenomenology and fundamental ontology]

[382] von Hermann, ibid 7, 9 ['In seinen Griechen-Interpretationen wetteifert Heidegger nicht mit anderen philosophischen, philosophiehistorischen und philologischen Untersuchungen. Jede dieser Zuwendungen zur griechischen Philosophie hat ihre eigene Legitimation und gelangt zu ihrer eigenen Wahrheit. Heideggers Griechen-Auslegungen verstehen sich nicht als Beiträge zur Forschungsliteratur. Sie halten sich vielmehr auf der Ebene eines eigenständigen systematischen Denkens, das innerhalb der Geschichte des Denkens eine eigene Grundstellung bezieht, zu deren thematischem Gegenstand die Geschichte der Philosophie im Ganzen und insbesondere das griechische Denken gehört. Hierhin zeigt sich eine Vergleichbarkeit mit dem Hegelschen Denken, das seine eigene Sache zugleich in einem Gespräch mit dem überlieferten Geschichte des Denkens denkt.']

[383] George Steiner, 'The Hermeneutic Motion' in Lawrence Venuti (ed), *The Translation Studies Reader* (London, New York: Routledge, 2000) 186, 186 ['All understanding, and the demonstrative statement of understanding which is translation, starts with an act of trust.']; ibid 187 ['The translator invades, extracts and brings home.']; See also Friedrich Schroeder, 'Sieglinge Pommer:

> What does this mean? It has been suggested, and still is suggested, that this fragment means being is difficult to get at and requires great efforts to be brought out of its hiding place and, as it were, purged of its self-hiding. But what is needed is precisely the opposite. Self-hiding belongs to the pre-dilection [*Vor-liebe*] of being, i.e., it belongs to what wherein being has secured its essence. And the essence of being is to unconceal itself, to emerge, to come out into the unhidden – φύσις. Only what in its very essence *un*conceals itself and must unconceal itself, can love to conceal itself. Only what is unconcealing can be concealing. And therefore the κρύπτεσθαι of φύσις is not to be overcome, not to be stripped from φύσις. Rather, the task is the much more difficult one of allowing to φύσις, in all the purity of its essence, the κρύπτεσθαι that belongs to it. [386]

'Something missing' can be understood as a trace of being's self-hiding or loving-to-conceal-oneself, discernible – paradoxically – in coming out into the unhidden; 'something missing' as an aspect of human being-ness aims at portraying 'the self-concealing revealing' of being, 'φύσις in the original sense'[387], and as such self-determined, nature of human beings. The event of disclosure of what is concealed, 'something missing', can be conceptualized as crossing the limit[388] between a hiding place and the unhidden. That very limit at once delineates the being whose being-ness becomes present through unconcealment and, consequently, the corresponding human image, the *Menschenbild*. The limit as the demarcating line of a *locus* within which a subject grounds its being-ness on the sphere of fundamental rights is, besides obviously political, aesthetically substantiated. Resort to the figurative rendering of traversing a limit for communicating the event of disclosure

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Rechtsübersetzung und Rechtsvergleichung. Translatologische Fragen zur Interdisziplinarität' (2008) 63(4) *JZ* 191

[384] von Herrmann (n 381) ['[…] Heideggers Griechen-Interpretationen […] erhalten sie zugleich eine Fülle von hermeneutischen Einsichten in die antiken Texte, die als textimmanente Erkenntnisse für jede andere interpretatorische Zuwendung zur griechischen Philosophie fruchtbar und fördernd sein können.']

[385] Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics' 183, 229; See also Heidegger, *Introduction to Metaphysics* 121 ff.; 133 ff [on interpretations and misinterpretations of Heraclitus in the course of Western history]; Cf. other translations: Kahn (1979) 105 ['Nature loves to hide']; Miroslav Marcovich, *Heraclitus – Greek text with a short commentary* (2nd edn, Sankt Augustin: Academia Verlag, 2001) ['The real constitution of each thing is accustomed to hide itself']; Nicholas Rescher, *Cosmos and Cognition – Studies in Greek Philosophy* (Frankfurt: Ontos Verlag, 2005) 60 ['Nature loves to hide']; Marcel van Ackeren, *Heraklit – Vielvalt und Einheit seiner Philosophie* (Bern: Peter Lang, 2006) 57 ['Das Wesen der Dinge versteckt sich gern.']

[386] Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics' 183, 229-30

[387] Heidegger, ibid 183, 230; Ivo De Gennaro, 'Φύσις und Metaphysik' in Günther, Hans-Christian & Antonios Rengakos (eds), *Heidegger und die Antike* (München: Verlag C. H. Beck, 2006) 11, 15

[388] The limit is intimated in Heraclitus, fragment 108, *ὁκόσων λόγους ἤκουσα, οὐδεὶς ἀφικνεῖται ἐς τοῦτο, ὥστε γινώσκειν ὅτι σοφόν ἐστι πάντων κεχωρισμένον*; Kahn (1979) [Of those whose accounts I have heard, none has gone so far as this: to recognize what is wise, set apart from all].

affirms the indispensability of poetics[389] for advancing an understanding of the process of coming-into-being; the limit can be perceived as a border that occasions ongoing critical reflection[390] on who crosses it, namely on who the human being is; it is both the limit crossed, and the limit that delineates the realm corresponding to a given 'surplus name'.

> Who the human being is – for philosophy, the answer to this problem is not inscribed somewhere in heaven.[391]

If not in heaven, the answer to the question should be sought in the world. Human dignity, a distinctly abstract and multidimensional concept, opens up a wide realm of becoming (*γίγνεσθαι*) within which *polemos* can bring about the ontologically appreciated presence of human beings as subjects in legal, political or aesthetic terms. Rancière brings forth the famous argument of Olympe de Gouges, 'if women were entitled to go to the scaffold, then they were also entitled to go to the assembly'[392]. In this example the limit separates, politically and, from the presently critical perspective, ontologically, the private from the public space. For women to establish their being-ness in the public space a limit need be traversed.

> Her point was that women, who were apparently born equal, were in fact not equal as citizens. They could neither vote nor stand for election. The proscription, as usual, was justified on the grounds that women did not fit the purity of political life, because they belonged to private, domestic life. The common good of the community had to be kept apart from the activities, feelings and interests of private life.[393]

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[389] See *infra* for the poetic dimension of the limit between 'something missing' and 'something there' in the epistemological considerations that emerge from the ontological account of human dignity.
[390] Rancière, *Dissensus* (2010) 68 ['Politics concerns that border, an activity which continually places it in question.']
[391] Heidegger, *Introduction to Metaphysics,* 149; Cf. Michael Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987) 74 [Referring to heaven apropos a Talmudic story: 'For this commandment which I command thee this day, it is not hidden from thee [Hebrew: *felah,* alternatively translated 'it is not too hard for thee']; neither is it far off. It is not in heaven, that thou shouldest say, Who shall go up for us to heaven, and bring it unto us, that we may hear it, and do it? […] *(Deuteronomy 30:11-14)*', Walzer notes: 'Moses indeed climbed the mountain, but no one need do that again. There is no longer any special role for mediators between the people and God. The law is not in heaven; it is a social possession.']
[392] Rancière, *Dissensus* (2010) 68
[393] ibid

However, as Rancière's argument evolves, we come to another important realization: the limits drawn in the world – philosophical-ontological, legal, political, or aesthetic – and not in heaven, can be obscure and ambiguous.[394]

> Olympe de Gouge's argument showed that it was not possible to draw the border separating bare life and political life so clearly. At least one point existed where 'bare life' proved to be 'political': when women were sentenced to death as enemies of the revolution. If they could lose their 'bare life' thanks to a politically motivated public judgment, this meant that even their bare life – their life from the standpoint of its being able to be put to death – was political. If they were as equal 'as men' under the guillotine, then they had the right to the whole of equality, including equal participation in political life.[395]

The standpoint of one's bare life, in other words of elemental human being-ness, is evidently relevant to the practice of the law of human dignity. Rancière identifies a state of affairs in which the deduction proffered in the argument of Olympe de Gouge 'could be enacted'[396], in other words practiced, namely 'in the process of a wrong, in the construction of a dissensus'[397], an analogy of the *polemos*.

> A dissensus is not a conflict of interests, opinions or values; it is a division inserted in 'common sense': a dispute over what is given and about the frame within which we see something as given. Women, as political subjects, set out to make a two-fold statement. They demonstrated that they were deprived of the rights that they had thanks to the Declaration of Rights and that through their public action that they *had* the rights denied to them by the constitution, that they could *enact* those rights. They acted as subjects of the Rights of Man […]. They acted as subjects that did not have the rights that they had and that had the rights that they had not. This is what I call a dissensus: the putting of two worlds in one and the same world. […] A political subject is a capacity for staging scenes of dissensus.[398]

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[394] Binder & Weisberg, *Literary Criticism of Law* (2000) 462 ['[l]egal judgment […] polices the disputed boundaries between public and private […]']; MacKinnon, *Are Women Human?* (2006) 4 f. [public – private distinction]; See also Pierre Bourdieu, *Outline of a Theory of Practice* (original edition: *Esquisse d' une théorie de la pratique. Précédé de trois études d' ethnologie kabyle*, Geneva: Librairie Droz, 1972; Cambridge Studies in Social and Cultural Anthropology, Cambridge, UK: Cambridge University Press, 1977) 43 ['intimate sphere of family life, i.e. in a woman's conversation with her father […]']

[395] Rancière (n 392) 68-69

[396] ibid 69

[397] ibid

[398] ibid

In crossing the limit the being asserts its presence within the realm of law as a subject of fundamental rights. The traversal of the limit signifies the movement from a state of concealment towards disclosure. The *a posteriori* identification of 'something missing' once it becomes 'something there', hence ontologically present, presupposes dissensus. Can dissensus be understood as a mode of constant critical reflection? Limits that *a priori* cannot be traversed engender the experience of deadlock and essentially disallow the unfolding of human being-ness, hence impair human dignity. References to the potential that inheres in the practice of the law of human dignity to restore the rightful place of subjects and to initiate new subjects into law is not seldomly found in legal literature[399]. The shadow that corresponds to 'something missing' becomes somehow tangible the moment these subjects positively partake in the order of fundamental rights. Dissensus then is a mode of constant critical reflection.

> If there is a positive content to this term [dissensus], it consists in the rejection of every difference that distinguishes between people who 'live' in different spheres of existence, the dismissal of categories of those who are or are not qualified for political life. […] Political names are litigious names, whose extension and comprehension are uncertain, and which for that reason open up the space of a test or verification. Political subjects build cases of verification. They put the power of political names – that is their extension and comprehension – to the test. Not only do they bring the inscription of rights to bear against situations in which those rights are denied but they construct the world in which those rights are valid, together with the world in which they are not. They construct a relation of inclusion and a relation of exclusion.[400]
> […] The strength of those rights lies in the back-and-forth movement between the initial inscription of the right and the dissensual stage on which it is put to the test. [401]

In exploring the meta-dimension of human dignity as a legal concept I center on the notion of the limit traversed in coming-into-being. Far from attempting to fill a void, rather I turn my sights to the line distinguishing 'something missing' from 'what is there'. What is the precise meaning of the limit? How is it to be drawn? The limit has an ontologically significant bearing on the processual aspect of practicing the law of human dignity and the ensuing *Menschenbild*, respectively as the limit traversed in coming-into-being and as the demarcating line of the space guaranteed to legal

[399] McCrudden (2008) 655, 721f.; Habermas, 'The Concept of Human Dignity' (2010) *Metaphilosophy* 464, 467f. [inventive function]
[400] Rancière, *Dissensus* (2010) 69
[401] ibid 71

subjects within the realm of fundamental rights. The further explication of this proposition rests on linguistic-analytical and phenomenological insights.

This ontological account reinforces opposition to *Leistungstheorien*[402], namely theories associating human dignity with *Leistung,* that is, performance or achievement. Starck sees a 'sociological misunderstanding' in this theoretical stance.[403] Rebutting the conveyed dynamism of human dignity as construed in *Leistungstheorien* need not imply passivity. 'Something missing' as the trace of ontologically framed concealment is a vital aspect of who the human being is. Concealment and unconcealment mutually constitute each other's condition and result, and signify phases in an ontologically dynamic process.

B. A linguistic-analytical account of practicing the law of human dignity

Linguistic-analytical philosophical insights contribute concepts and graphs for portraying and exploring the practice of human dignity language in legal texts, thereby prompting a more meaningful mobilization of the law of human dignity. As hermeneutic and literary analytical tools they permit original interpretations of human dignity meaning and another understanding of issues that feature prominently in relevant legal literature. The linguistic-analytical account of the law of human dignity intimates the possibility of transcendence of the limit; advances an understanding of law's meta-dimension and *Menschenbild* apropos the dual sense of 'something missing'; provides the hermeneutic and literary methodological approach with tools for tracing the human factor in legal language games; and permits the portrayal of how the boundaries of legal language games can change. Was not imagining the law of human dignity post World War II actually the imagining of a new form of life[404]?

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[402] See Luhmann, Grundrechte als Institution: ein Beitrag zur politischen Soziologie (Berlin: Duncker & Humblot, 1965) 53ff., 61

[403] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 24

[404] Dworkin, *Law's Empire* (1986) 63f. ['[…] a social practice creates and assumes a crucial distinction between interpreting the acts and thoughts of participants one by one […] and interpreting the practice itself, that is, interpreting what they do collectively. It assumes that distinction because the claims and arguments participants make, licensed and encouraged by the practice, are about what *it* means, not what *they* mean. [If participants in that process do not agree, then] [t]hey must, to be sure, agree about a great deal in order to share a social practice. They must share a vocabulary […]. They must understand the world in sufficiently similar ways and have interests and convictions sufficiently similar to recognize the sense in each other's claims, to treat these *as* claims rather than just noises. That means not just using the same dictionary, but sharing what Wittgenstein called a form of life sufficiently concrete so that the one can recognize sense and purpose in what the other says and does […]. They must all 'speak the same langauge' in both senses of that phrase. But this similarity of

Why is a linguistic-analytical account of the law of human dignity a crucial step towards cultivating an understanding of law's meta-dimension? First, transition to 'linguistic-analytical' discourses from any other kind of discourse is generally meant to 'secure clear and meaningful speech.'[405] The transition to a 'linguistic-analytical' discourse at any time is imperative[406] when, while communicating, actors 'use the same expression with different meanings'[407], in other words when the required 'communality in the use of language'[408] in discourse is not attained.[409] As Alexy explains,[410] 'linguistic-analytical' discourses are 'concerned […] with the discovery of ambiguities, indeterminacies, emotive components of meaning, and absurdities'[411]. Second, language as the basis of communication and society[412] is essentially the point of departure for a relational understanding of how the legal concept is practiced. The unraveling of an affirmative stance towards the dual sense of 'something missing' originating in linguistic-analytical insights[413] incites revising predispositions towards ambiguity and controversy.

Drawing on well-known propositions and themes in the work of Ludwig Wittgenstein serves to refine the delineation of the research question and to inspire

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interests and convictions need hold only to a point: it must be sufficiently dense to permit genuine disagreement, but not so dense that disagreement cannot break out.']

[405] Alexy, *A Theory of Legal Argumentation* (1989) 144-145; Wittgenstein, *Tractatus,* (4.116) ['Everything that can be thought at all can be thought clearly. Everything that can be said can be said clearly.']

[406] Alexy ibid; ibid 206 [Alexy expressly formulates a transition rule in general practical discourse].

[407] See Alexy ibid 188 [One of the basic rules of general practical discourse is: 'Different speakers may not use the same expression with different meanings.']

[408] See also Perelman, Chaïm & Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation,* (original published *La Nouvelle Rhétorique: Traité de l' Argumentation* in Paris: Presses Universitaires de France, 1958; John Wilkinson & Purcell Weaver trs, Notre Dame, London: University of Notre Dame Press, 1969) 15ff.

[409] Alexy (n 405) 190-191 ['It is a matter of controversy how this communality is to be established and secured. Representatives of the Erlangen School stipulate that every expression should be subjected to the rules of an "ortho-language" to achieve communality. For this, ordinary language can only be used in a subordinate role. […] There is quite a lot to be said in favour of starting out from ordinary language and only making stipulations concerning word usage where obscurities and misunderstandings arise. Analysis of the expressions used is a presupposition of any such stipulation. […].']

[410] ibid 144-145

[411] ibid

[412] See Giese, *Das Würde-Konzept* (1975) 73f.; ibid 77; Arthur Kaufmann, 'Gedanken zu einer ontologischen Grundlegung der juristischen Hermeneutik' in ibid, *Beiträge zur Juristischen Hermeneutik: sowie weitere rechtsphilosophische Abhandlungen* (first published in 1982; Köln: C. Heymann, 1984) 89, 96 ff. [relational conception]; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 114 ['Jedenfalls im Rechtsinne ist Würde demnach kein Substanz-, Qualitäts- oder Leistungs-, sonder ein Relations- oder Kommunikationsbegriff. Würde muß als eine Kategorie der Mitmenschlichkeit des Individuums begriffen werden.']

[413] Wittgenstein, *Tractatus,* (4.0031) ['All philosophy is 'Critique of language […].']

and flesh out a linguistic-analytical model[414]. Driven by Wittgenstein's celebrated thesis that problems framed as philosophical problems are, in fact, associated with misunderstandings of the logic of our language[415], I seek linguistic-analytical tools to portray and interpret the practice of human dignity language in law focusing on the question of how the concept is empty.

> (4.112) […] Philosophy is not a theory but an activity.[416]

Philosophy as activity is manifested in actual propositions; it is an organic aspect of linguistic acts. Thus, philosophizing the language of law is critical to understanding the practice of law, for instance by drawing parallels between patterns and ideas, the form and the content of philosophy as activity, and the mobilization of language by legal actors.[417] The linguistic-analytical account of the law of human dignity is attuned to the premise that this analysis focuses on law as language.

> (4.003) Most propositions and questions, that have been written about philosophical matters, are not false, but senseless. We cannot, therefore, answer questions of this kind at all, but only state their senselessness. […]
> (They are of the same kind as the question whether the Good is more or less identical than the Beautiful.)
> And so it is not to be wondered at that the deepest problems are really *no* problems. […][418]

Under proposition (6.421), Wittgenstein parenthetically notes, 'Ethics and aesthetics are one'[419]. Reference to the relation between ethics and aesthetics, between the 'Good' and the 'Beautiful', occasions an important clarification. Both ethics and

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[414] Wittgenstein clarifies, in ibid (6.211): 'In life it is never a mathematical proposition which we need, but we use mathematical propositions *only* in order to infer from propositions which do not belong to mathematics to others which equally do not belong to mathematics. (In philosophy the question 'Why do we really use that word, that proposition?' constantly leads to valuable results.)' The closing parenthetical question indicates the value of transition to linguistic-analytical discourses.
[415] ibid (4.003) ['Most questions and propositions of the philosophers result from the fact that we do not understand the logic of our language.']; ibid (4.112) ['The object of philosophy is the logical clarification of thoughts. […] A philosophical work consists essentially of elucidations. The result of philosophy is not a number of 'philosophical propositions', but to make propositions clear. Philosophy should make clear and delimit sharply the thoughts which otherwise are, as it were, opaque and blurred.']; Levinas, *Totality and Infinity*, 17 [Introduction by John Wild] ['[…] conclusions of our basic philosophical questions are to be found beyond metaphysics, in ethics.']
[416] Wittgenstein, ibid (4.112)
[417] Cf. Wittgenstein, *Tractatus,* (5.557) ['The *application* of logic decides what elementary propositions there are. What lies in the application logic cannot anticipate. It is clear that logic may not collide with its application. But logic must have contact with its application. Therefore logic and its application may not overlap one another.']
[418] ibid (4.003)
[419] ibid (6.421)

aesthetics are senseless[420] apropos the world as delineated and described in Wittgenstein's *Tractatus Logico-Philosophicus* and *Philosophical Investigations.*[421] Gadamer notes, ''to have a horizon' means not being limited to what is nearby but being able to see beyond it.'[422] It is suggested that the following excerpt is read in that spirit.

> What can be said at all can be said clearly; and whereof one cannot speak thereof one must be silent. […]
> The limit can, therefore, only be drawn in language and what lies on the other side of the limit will be simply nonsense.[423]
> (6.421) It is clear that ethics cannot be expressed. Ethics are transcendental.[424]

Ethics and aesthetics, the Good and the Beautiful, are ineffable as nonsensical and transcendental. What does this convey about the meaning of law's *Menschenbild* and meta-dimension? The Good and the Beautiful, regardless of how diversely different legal orders and cultures define those[425], are manifested in human dignity. The transcendental is thus practiced whenever the law of human dignity is mobilized in texts.

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[420] In the succeeding phenomenological analysis such senselessness is put into words, without being, for that reason, irreconcilable with Wittgensteinian logic.

[421] Transposing the rigid lines of Wittgenstein's pure logic in the *Tractatus Logico-Philosophicus* – which, in fact, Wittgenstein himself flexed in his later work *Philosophical Investigations* – to the practice of the law of human dignity is neither promising nor desirable an enterprise. Critical reflection is not served by the inflexible analytical style and tone of the *Tractatus Logico-Philosophicus.* Drawing analogies from linguistic-analytical concepts and graphs permits another understanding of how the law of human dignity is practiced. The *Tractatus Logico-Philosophicus* constitutes an intelligible, appropriate and sufficient source of insights for elaborating on the notion of the limit as a central theme in a story of 'something missing'. In his later work, *Philosophical Investigations,* Wittgenstein adopts a different style: his thought presents greater versatility and appears to be more open to the complexity of language and the world. See Wittgenstein, *Philosophical Investigations* 3^{e}-4^{e} [Preface: 'After several unsuccessful attempts to weld my results together into such a whole, I realized that I should never succeed. The best that I could write would never be more than philosophical remarks; my thoughts soon grew feeble if I tried to force them along a single track against their natural inclination. – And this was, of course, connected with the very nature of the investigation. For it compels us to travel criss-cross in every direction over a wide field of thought. – […] So this book is really just an album.']; ibid 4^{e} [Preface: 'Four years ago, however, I had occasion to reread my first book (the *Tractatus Logico-Philosophicus*) and to explain its ideas. […] For since I began to occupy myself with philosophy again, sixteen years ago, I could not but recognize grave mistakes in what I set out in that first book.']; ibid 15^{e} ['23. […] It is interesting to compare the diversity of the tools of language and of the ways they are used, the diversity of kinds of word and sentence, with what logicians have said about the structure of language. (This includes the author of the *Tractatus Logico-Philosophicus*.)'].

[422] Gadamer, *Truth and Method* (1975, 2004) 301; ibid 302 ['A person who has an horizon knows the relative significance of everything within this horizon, whether it is near or far, great or small.']

[423] Wittgenstein, *Tractatus,* 23 [Preface]

[424] ibid (6.421)

[425] See Jack Donnelly, 'Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights' (1982) 76(2) *The American Political Science Review* 303

Wittgenstein metaphorically builds a ladder in his *Tractatus Logico-Philosophicus* to lead us to sense the limit of the world, that is, our world.[426] What cannot be expressed – hence nonsense if articulated – is so, using 'our world' perceived in terms of logic[427] as the reference point. Human dignity stands on the borderline between what can be 'said' and what cannot be 'said', but only 'shown' or sensed, thus constitutes the paradigmatic legal concept for exploring the notion of the limit. The colloquially put 'gut-feeling', which cannot be adequately expressed with words, vividly denotes how aspects of human dignity meaning can only be 'shown', and not 'said'.

The notion of the limit is key to solving whatever riddles lie in the dual sense of 'something missing' associated with law's meta-dimension and *Menschenbild*. Philosophical linguistic-analytical insights into the limit demonstrate how and why the practice of human dignity in law upholds law's meta-dimension, hence law's humanism, and manifests the pluralism that corresponds to the empty *Menschenbild*. On the side of this attempt, I confront other instances of 'something missing' by analogy with the *Leerstelle* and undertake to portray those by means of the introduced model. Setting up the introduced linguistic-analytical model constitutes *per se* a hermeneutic enterprise and, additionally, a tool for the hermeneutic and literary approach to instances of judicial practice of human dignity in Chapter Two.

How is the law of human dignity empty? ' 'Something always missing' stands for the transcendental, what cannot be said. The conscious focus on the limit should not be misunderstood either as abstention from exploring the transcendental, or as aphoristic omission of themes and tensions in 'our world'. With regards to the space outside 'the world' nothing can be 'said'. All that can be 'shown', as Levinas implies (see *infra*), is our separation from the space beyond the limit, 'something always missing'. The separation can be 'shown', in other words sensed or felt; Wittgenstein notes, '[t]he feeling of the world as a limited whole is the mystical feeling.'[428] With regards to the area within the boundaries of our language, assessing the meaning of 'something missing' requires exploring the context of the *Leerstelle*.

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[426] Wittgenstein (n 423) (6.54) [the ladder metaphor]

[427] ibid (1.13) ['The facts in logical space are the world.']; This proposition intimates, for present purposes, first, how the world is conceived in philosophy of language and logic, that is, in purely linguistic-analytical terms; second, that the world of lived experience is larger than the world, if the latter is perceived as facts in logical space; and, ultimately, that the linguistic-analytical account alone does not suffice to portray the practice of the law of human dignity.

[428] ibid (6.45)

By analogy with the treatment of the *Leerstelle*, the *ad hoc* meaning of 'something missing' in practicing the law of human dignity can be deduced from linguistic context. How and why do I associate the notion of the limit with the meta-dimension of human dignity meaning and law's *Menschenbild*? In this critical approach to the practice of the law of human dignity, the dual sense of 'something missing' can, for instance, shed new light on the *Leerformel*[429] and the intuitionism and agnosticism it is charged with, or the empty box and black box figures. Let us first proceed with constructing the linguistic-analytical model to arrive at solid footing for substantiation of the limit.

Legal actors consciously[430] mobilize human dignity language in legal texts; in practicing such language, their competence and responsibility, as well as the responsibility to be competent to do so, are assumed. This is a foundational premise of the introduced linguistic-analytical model, and, granted, of important legal-sociological underpinnings. Legal actors – for present purposes reductively perceived as authors of legal texts – bear the determinant authority over human dignity meaning[431], namely signification and significance[432] or value[433], admittedly under

[429] Hoerster (1983) 93, 95 [discussion about the *Leerformel*]; Wolfram Höfling, 'Die Unantastbarkeit der Menschenwürde – Annäherungen an einen schwierigen Verfassungsrechtssatz' (1995) *JuS* 857, 859 ['[…] seinen prekären Funktion als Lehrformel oder Leerformel […]' (trans. its precarious function as a teaching/didactic formula or an empty formula)]; ibid 859 ff.; See also, critically, Stöcker (1968) 685, 686 ['Allein, die Freiheit, die den Menschen zur Autonomie befähigen könnte, ist bei *Kant* eine bloße Idee ohne jede emprische Realität, die 'niemals begriffen oder nur eigesehen werden kann: eine Fiktion also, gegründet auf einer als Realität geleugneten Freiheit. Dementsprechend stehen im Auslegungsmittelpunkt des Art. 1 I GG weniger die Freiheit des Menschen als etwa seine 'Personhaftigkeit': eine prätentiöse Leerformel, die in ihrer auf intuitive Erschauung angelegten Unbegreiflichkeit verdeutlicht, daß auch hier der metaphysische Aspekt, säkularisiert oder nicht, in Intuitionismus und Rechtsagnostizismus mündet. Das sind in jedem Fall unannehmbare Konsequenzen. Denn die Würde des Menschen kann nicht darin erfüllen, daß wir ihn seinen 'Gefühlen': Ahnungen, Vorurteilen, atavistischen Instinkten, überantworten. Und Rechtsagnostizismus – als Absage an die Vernunft, aus eigener Kraft wissen zu können, was Recht ist – macht die Jurisprudenz zu einer Farbenlehre für Blinde, womit der Gipfel, auf dem sich die menschliche Würde entfaltet, mit Sicherheit ebenfalls nicht erklommen wäre.']

[430] Baer, Rechtssoziologie (2011) 26; 209-211 [Rechtsbewusstsein]

[431] Practicing the law of human dignity can be 'violent' in the sense of Pierre Bourdieu's concept of 'symbolic violence'. This concept can inform our understaning of conceivable scenarios of exercising 'authority over meaning'. Pierre Bourdieu & Jean-Claude Passeron, *Reproduction in Education, Society and Culture* (2nd edn, London: Sage Publications Ltd, 1977) 4 ['Every power to exert symbolic violence, i.e. every power which manages to impose meanings and to impose them as legitimate by concealing the power relations which are the basis of its force, adds its own specifically symbolic force to those power relations.']; ibid 25 ['[…] any action of symbolic violence which succeeds in imposing itself [...] objectively presupposes a delegation of authority. […] these symbolic actions can work only to the extent that they encounter and reinforce predispositions […]. There is no "intrinsic strength of the true idea"; nor do we see grounds for belief in the strength of the false idea, however often repeated. It is always power relations which define the limits within which the persuasive force of a symbolic power can act […].']

certain constraints. Among those constraints, the authority of individual human beings involved in cases of human dignity violations over meaning vis-à-vis that of the constitutional judge or the democratic body politic and society as collectivities is emphasized in the portrayal of the legal texts under scrutiny in Chapter Two. The linguistic-analytical model assists us in tracking the human factor in the practice of the law of human dignity. That the human being is *homo significans* denotes that language mirrors meaning – the meaning directly produced by the legal actor as author, the meaning referred to, or the meaning assumed; this is a central premise of the present hermeneutic and literary enterprise.

Linguistic-analytical insights afford a toolset for portraying the practice of human dignity meaning in law drawing on its, only partial, reflection in legal texts. The undertaking should not be misunderstood as an effort to detect – or, in actuality, assume – the intentions underlying the meaning produced, though the portrayal *per se* can spark critical reflection on what is signified as character in rhetoric, namely the ethical underpinnings of Aristotelian *praxis*. Language restrains meaning, while at the same time augments it[434]. The practice of human dignity by legal actors can be depicted as a legal language game[435]. Legal language games are *sui generis* language games[436]; they operate on their own terms and certainly involve more than descriptive and explanatory propositions.[437] Games are rule-bound[438] activities. Opting for the

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[432] The importance of bearing in mind this dual understanding of meaning becomes evident where human dignity is practiced by merely being employed as language in a legal text, in other words without being further analyzed. In that case the concept's significance, that is, value, in law, despite the lack of explicit signification – ensuing from the relationship between signified and the signifier – in the text, corresponds to the rhetorical dimension of language in the spirit of Aristotle's well-rounded approach to the art of rhetoric. In light of the ontological account (*supra* under Part A) even mere presence carries a meaning in the sense of signification, besides significance, namely the guarantee of being's self-concealing revealing ontology. See also Lebech (2009) 21 ['[…] human dignity can, does, and indeed is likely to play the role of a universal cultural ideal because it can, is and indeed is likely to be identified in experience by every human being *as the importance of that experience,* regardless of the individual's tradition or culture.']

[433] See de Saussure, *Course in General Linguistics* (1986) 110ff.

[434] Regarding in particular the relation of language to thought, i.e. thoughts being 'the significant propositions' in Wittgenstein, *Tractatus,* (4); ibid (4.002) ['Language disguises the thought; so that from the external form of the clothes one cannot infer the form of the thought they clothe, because the external form of the clothes is constructed with quite another object than to let the form of the body be recognized.']

[435] Wittgenstein, *Philosophical Investigations*, 8e ['I shall also call the whole, consisting of language and the activities into which it is woven, a 'language game'.']; ibid 15e ['The word 'language-*game*' is used here to emphasize the fact that the *speaking* of language is part of an activity, or a form of life.']

[436] Alexy, *A Theory of Legal Argumentation* (1989) 50

[437] ibid 50 ['[…] the descriptive function of language is only one among several. The implication of this for ethics is that there is no need at all to be guided (either in a naturalistic or in an intuitionistic direction) by a paradigm of the descriptive or explanatory sciences. Both moral and legal discourse are language games *sui generis.*']

term 'language game'[439] is an investment in the evocation of both the playfulness and rule-governed *modus operandi* of games. In portraying the practice, in particular the judicial practice, of the law of human dignity, I avail myself of both qualities. This portrayal invites engagement in further definitional projects.[440]

Under proposition (5.6331) of the *Tractatus Logico-Philosophicus* Wittgenstein introduces the famous simile of the eye and the field of sight[441]. The introduced model is grounded on this graph.[442] 'What is there', the totality of facts within our field of sight, all the same establishes 'something always missing'.[443] Conceiving of either space presupposes a limit.

(5.6331) For the field of sight has not a form like this [graph 1][444]:

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[438] See also Binder & Weisberg, *Literary Criticism of Law* (2000) 153 ['[...] interpretation is a convention-bound activity. Interpretation generally involves putting a text to use in some institutional context in a way that will be accepted by other participants as legitimate. […] writing is generally convention-bound as well. Authors produce texts for use in some institutional context.']

[439] From the range of other possibilities consider the concept of a 'speech act', John Langshaw Austin, *How to Do Things with Words How to Do Things with Words* (J. O. Urmson & Marina Sbisà eds, 2nd edn, Oxford University Press, 1962) 20

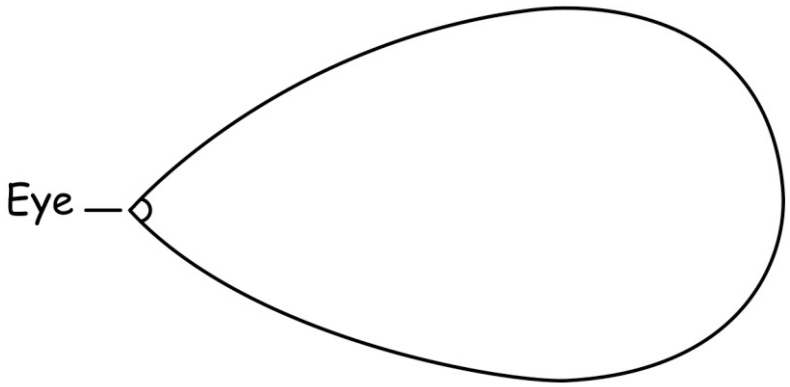
[440] Alexy observes, '[t]he crucial factor for this [the definitional] mode of justification is that the presentation of the system of rules as defining a practice is considered the real motive for adopting that practice. This of course does not exclude the option of using other modes of justification as well.' A definitional project consists in examining methodically a system of rules identified in a language game and proposing the ensued definition. Language games can be actual or hypothetical. The definitional mode of justification does not compromise the appropriateness of other modes of justification; this is an important advantage of that mode. In fact it cuts through other modes, is compatible to rules of justification set out in light of other modes, and can potentially enhance their usage. At the same time, it suffers from the weakness that it does not compel further justification of the system of rules thereby depicted. Definitional projects are meant to simply elucidate and present a system, hence enhance our understanding of practice. Although they rest 'to some degree upon mere fiat or arbitrary will', they are not 'pointless'. Alexy notes, 'It does make a difference whether one decides in favour of an explicitly formulated and comprehensively presented system of rules or whether one chooses something wholly lacking in conceptual and analytic endeavour. The definitional mode of justification can be advantageous in another way too. It allows the construction of completely new systems of rules.' In Alexy (n 436) 184-185

[441] Cf. Gadamer, *Truth and Method* (1975, 2004) 301 ['Every finite present has its limitations. We define the concept of 'situation' by saying that it represents a standpoint that limits the possibility of vision. Hence essential to the concept of situation is the concept of *'horizon'*. The horizon is the range of vision that includes everything that can be seen from a particular vantage point. Applying this to the thinking mind, we speak of narrowness of horizon, of the possible expansion of horizon, of the opening up of new horizons, and so forth.']

[442] The graph is related to the discussion of solipsism. Wittgenstein, *Tractatus,* (5.62) ['This remark provides a key to the question, to what extent solipsism is a truth. In fact what solipsism *means,* is quite correct, only it cannot be *said,* but it shows itself. That the world is *my* world, shows itself in the fact that the limits of the language (the language which only I understand) mean the limits of *my* world.']; ibid (5.621) ['The world and life are one.']; ibid (5.63) ['I am my world. (The microcosm.) […].']

[443] ibid (1.21) ['For the totality of facts determines both what is the case, and also all that is not the case.']

[444] ibid (5.6331)



The finitude of our world as a portion of the world and our separation – irreconcilable in the case of the meta-dimension, and reconcilable in the paradigm of the *Leerstelle* – from 'something missing', the rest, or what escapes our perception in the two senses that have been named herein are understood apropos the notion of the limit, about which nothing can be 'said'. Why is that so? In his famous introduction to the *Tractatus Logico-Philosophicus*, Bernard Russell deduces from Wittgenstein's fundamental thesis that any account of the world is necessarily reductive. His comment on the simile of the eye and the field of sight opens the present discussion.

> Wittgenstein uses, as an analogy, the field of vision. Our field of vision does not, for us, have a visual boundary, just because there is nothing outside it, and in like manner our logical world has no logical boundary because our logic knows of nothing outside it. These considerations lead him to a somewhat curious discussion on Solipsism. Logic, he says, fills the world. The boundaries of the world are also its boundaries. In logic, therefore, we cannot say, there is this and this is in the world, but not that, for to say so would apparently presuppose that we exclude certain possibilities, and this cannot be the case, since it would require that logic should go beyond the boundaries of the world as if it could contemplate these boundaries from the other side also. What we cannot think we cannot think, therefore we also cannot say what we cannot think.
> […] That the world is *my* world appears in the fact that the boundaries of language (the only language I understand) indicate the boundaries of my world. The metaphysical subject does not belong to the world but is a boundary of the world.[445]

The eye in the graph under proposition (5.6331) represents the 'metaphysical subject', which, Wittgenstein notes, 'does not belong to the world but, rather, is the limit of the world.'[446]

[445] ibid 15-16 [Introduction]
[446] ibid (5.632)

> (5.633) *Where in* the world is the metaphysical subject to be noted?
> You say that this case is altogether like that of the eye and the field of sight. But you do *not* really see the eye.
> And from nothing *in the field of sight* can it be concluded that it is seen from an eye. [447]

Nothing can be said about the limit of the field of sight because the eye, the metaphysical subject, cannot see it. The totality of 'what is there', before the eye, cannot comprise the limit. Though it necessarily escapes the eye's gaze, the limit is not tantamount to 'something missing'; rather it is spatially identified with the metaphysical subject.

Who is the metaphysical subject? The metaphysical subject is the 'philosophical I'[448], which 'is not the man, not the human body or the human soul of which psychology treats, but the metaphysical subject, the limit – not a part of the world.'[449] Minding that Wittgensteinian logic and the analysis in the *Tractatus Logico-Philosophicus* in particular[450] aim at the elucidation of meaning, distinguishing between the metaphysical subject and the cognitive account of the human being as human body and soul should not be misinterpreted[451] as implying that the latter dimension of human being-ness is trivial. This definition simply clarifies the level at which Wittgenstein's simile operates. Wittgenstein conceives of the *Tractatus Logico-Philosophicus* as a contribution to the distinction between propositions that are senseless and others that are not. The metaphysical subject is negatively delineated; the human body and soul are not defining features.

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[447] ibid (5.633)

[448] Resorting to how Wittgenstein conceives of the function of philosophy particularly on account of the notion of limit can enhance our understanding of the 'philosophical' in the *Tractatus*: Wittgenstein, *Tractatus*, (4.113) ['Philosophy limits the disputable sphere of natural science.']; ibid (4.114) ['It should limit the thinkable and thereby the unthinkable. It should limit the unthinkable from within through the thinkable.']; ibid (4.115) ['It will mean the unspeakable by clearly displaying the speakable.']; The 'philosophical I' and the metaphor of the eye and the field of sight indicate the phenomenological character and value of insights derived from these propositions. Under Chapter One, Part C, the introduced model is combined with aspects of Emmanuel Levinas' phenomenology.

[449] ibid (5.641)

[450] ibid (6.53) ['The right method of philosophy would be this. To say nothing except what can be said, i.e. the propositions of natural science, i.e. something that has nothing to do with philosophy: and then always, when someone else wished to say something metaphysical, to demonstrate to him that he had given no meaning to certain signs in his propositions. This method would be unsatisfying to the other – he would not have the feeling that we were teaching him philosophy – but it would be the only strictly correct method.']

[451] One is led to the conclusion that the human body and soul are simply irrelevant, 'nonsense', apropos the purposes of the particular argument, from other instances in the *Tractatus*. Cf. Wittgenstein, (n 448) (4.002) ['[…] Colloquial language is a part of the human organism and is not less complicated than it. […].']

The Wittgensteinian conception of the 'philosophical I' serves the linguistic-analytical ends of the *Tractatus Logico-Philosophicus*, yet imposes no restrictions as to the drawing of analogies for a hermeneutic and literary approach to the law of human dignity. Wittgenstein's philosophy of language is no less anthropocentric than the writings of philosophers who explicitly link metaphysics with humanism, from Plato to Heidegger (see *supra*) or conceive of humanistic first-person accounts of the world, as Levinas does. Where can we trace humanism in the *Tractatus Logico-Philosophicus*? Embarking on an inquiry into this matter presupposes a better understanding of the simile of the eye and the field of sight as the basis of the herein introduced model.

> (5.634) This [the graph of the eye and the field of sight] is connected with the fact that no part of our experience is also a priori.
> Everything we see could also be otherwise.
> Everything we can describe at all could also be otherwise.
> There is no order of things a priori.
> (5.64) Here we see that solipsism strictly carried out coincides with pure realism. The I in solipsism shrinks to an extensionless point and there remains the reality co-ordinated with it.
> (5.641) There is therefore really a sense in which in philosophy we can talk of a non-psychological I.
> The I occurs in philosophy through the fact that the 'world is my world'. […][452]

Metaphysical subjects are the same in that everything they see and describe could also be otherwise. The perspectives of all metaphysical subjects have the same validity. Proposition (6.4), 'All propositions are of equal value […]'[453], spells out this insight. Human beings, perceived as metaphysical subjects, are identified with the limit. Sameness with regards to where they are positioned vis-à-vis their world is, at once, the condition of difference and uniqueness.[454] Reference to solipsism, characterized 'somewhat curious' in the introductory comment by Russell, sharpens

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[452] Wittgenstein, ibid (5.634), (5.64), (5.641)
[453] ibid, (6.4)
[454] Binder & Weisberg, *Literary Criticism of Law* (2000) 468 ['Perspectivism is not the same as relativism, which implies that multiple equally true claims can be made about the same object. Perspectives are not propositions or opinions about a reality that exists independent of them. Nietzsche insists that no particular point of view is epistemologically superior in the sense of affording those who occupy it a better picture of the world as it really is, but his position does not imply that all points of view are equally valuable.']; Alexander Nehamas, *Nietzsche – Life as Literature* (Cambridge: Harvard University Press, 1985) 3 ['But I also think – and so, I believe and argue, does Nietzsche – that some interpretations are better than others and that we can even know sometimes that this is the case.']

this point. We could only 'say things about the world as a whole'[455] from a viewpoint external to the world.[456] The limits of the world can be perceived only from a point outside the world. God's eye evokes the meta-dimension and should not be confused as referring to a specific God. Any account of the world is finite and reductive and does not encompass the limit separating it from what lies beyond it, namely 'something always missing'. What ensues is that human beings are same as essentially limited, yet cannot be encompassed and delimited.

> (5.556) There cannot be a hierarchy of the forms of the elementary propositions. Only that which we ourselves construct can we foresee.[457]
> (5.5561) […] The hierarchies are and must be independent of reality.

Foreseeable and controllable, as lying within our grasp or vision, is the meaning we ourselves produce.[458] The fact that the world, a totality[459], could cease to be for us the whole world intimates the dual sense of 'something missing' manifested in our essentially reductive perspective. That hierarchies 'are and must be independent of reality' corresponds to the transcendental nature of ethics and aesthetics and the metaphysical character of the subject in the *Tractatus Logico-Philosophicus*.

> Our world may be bounded for some superior being who can survey it from above, but for us, however finite it may be, it cannot have a boundary, since it has nothing outside it.[460]

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[455] Wittgenstein (n 448) (1) ['The world is everything that is the case.']; ibid (1.1) ['The world is the totality of facts, not of things.']; ibid (1.11) ['The world is determined by the facts, and by these being *all* the facts.']

[456] ibid, 15 [Introduction] ['We here touch one instance of Wittgenstein's fundamental thesis, that it is impossible to say anything about the world as a whole, and that whatever can be said has to be about bounded portions of the world. […] According to this view, we could only say things about the world as a whole if we could get outside the world, if that is to say, it ceased to be for us the whole world.']

[457] ibid (5.556)

[458] It would not be farfetched, in the spirit of the hermeneutic and literary methodological approach I adopt, to draw a link between human beings as creators ('[…] that which we ourselves construct […]') and the instances in the course of human dignity in the history of ideas, where the human being has been honored as a creator and the dignity of the human being has been associated with the *imago Dei* doctrine. The *e contrario* argument derived from Wittgenstein's proposition is that what we do not ourselves construct lies outside our grasp. The implications of the syllogism for biotechnology and bioethics issues that are framed as human dignity legal questions are plain to see.

[459] Cf. Wittgenstein (n 448) (2.063) ['The total reality is the world.']; ibid (4.001) ['The totality of propositions is the language.']; ibid (4.11) ['The totality of true propositions is the total natural science (or the totality of the natural sciences).']; ibid (5.5561) ['Empirical reality is limited by the totality of objects. The boundary appears again in the totality of elementary propositions. […].']

[460] ibid 15 [Introduction]

Transposing this perception of the meta-dimension apropos the notion of the limit to the practice of law triggers an interpretation of 'God' in the Preamble to the Basic Law as the external to our world perspective from which the limit can be seen. The notion of *logos* [*λόγος*], stemming from the same etymological source as logic, beyond being a philosophical term[461] ever since the time of first philosophy, namely the Presocratics, features prominently also as a theological concept.[462] Wittgenstein's reference to logic synopsizes the various insights extracted from his analysis in the *Tractatus Logico-Philosophicus* so far, refines the conception of the meta-dimension in linguistic-analytical terms, and gives rise to epistemological considerations. That the logical form is 'shown' in the propositions of our language intimates how 'something always missing' is practiced in the use of language and permits drawing parallels between logic, theology and metaphysics in philosophy.

> (5.552) The 'experience' which we need to understand logic is not that such and such is the case, but that something *is*; but that is *no* experience.
> Logic *precedes* every experience – that something is *so.*
> It is before the How, not before the What. [463]
> (6.13) Logic is not a theory but a reflexion of the world. Logic is transcendental. [464]

Logic, the transcendental reflection of the world, precedes the 'How', not the 'What'; under propositions (6.432), (6.44), (6.45), and (6.522) Wittgenstein elaborates on the meaning of the 'How'.

> (6.432) *How* the world is, is completely indifferent for what is higher. God does not reveal himself in the world.
> (6.44) Not *how* the world is, is the mystical, but *that* it is.
> (6.45) The contemplation of the world sub specie aeterni is its contemplation as a limited whole.

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[461] Language in philosophy is intertwined with *logos.* Language is foundational to human relations because it enables communication. It is inextricably associated with *logos.* Heidegger, inquiring into the essence of word and saying as conceived by Greek philosophy, in particular Aristotle, critically notes: 'Only when language has been debased to a means of commerce and organization, as is the case with us, does thought rooted in language appear to be a mere "philosophy of words," no longer adequate to the "pressing realities of life." This judgment is simply an admission that we ourselves no longer have the power to trust that the word is the essential foundation of all relations to beings as such. […] when Aristotle appeals to λέγεσθαι he is not relying extraneously on some "linguistic usage" but is thinking out of the original and fundamental relation to beings.' Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics' 183, 214

[462] In the first chapter of the Gospel of John (1:1) we find: 'In the beginning was the Word, and the Word was with God, and the Word was God.' ['*Ἐν ἀρχῇ ἦν ὁ λόγος, καὶ ὁ λόγος ἦν πρὸς τὸν θεόν, καὶ θεὸς ἦν ὁ λόγος.*']

[463] Wittgenstein, *Tractatus,* (5.552)

[464] ibid (6.13)

> The feeling of the world as a limited whole is the mystical feeling.[465]
> (6.522) There is indeed the inexpressible. This *shows* itself; it is the mystical.[466]

The logical form is 'shown' in propositions as pictures of reality, or, more specifically, models of reality 'as we think it is'[467]. In the spirit of proposition (5.556), according to which 'only that which we ourselves construct can we foresee […]'[468],

> (4.12) Propositions can represent the whole reality, but they cannot represent what they must have in common with reality in order to be able to represent it – the logical form.
> To be able to represent the logical form, we should have to be able to put ourselves with the propositions outside logic, that is outside the world.[469]

The logic of the world and the logical form of propositions are reflected in language. Propositions can represent reality, but cannot represent the logical form. That the logical form is rather 'shown' in language, intimates its unmediated perception. Linguistic-analytical insights afford a link to the notion of the concealed in the thought of Heraclitus and the emphasis on the meaning of practicing the law of human dignity in the present inquiry. The ineffable, the empty, 'something missing' or concealed as features of the sign, presently 'human dignity', are revealed and declared when the sign is applied, that is, in practicing human dignity language.[470]

The latter remark furthermore elucidates the poetic sense in which something outside the world 'mirrors itself' in propositions of our language, that is, our world[471]. It moreover alludes to the link between non-mediation and what is 'shown' or the notion of the image, which features *infra* in the phenomenological account as the face of the other. Logic lies outside the world. The relation between the viewpoint outside

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[465] ibid (6.432), (6.44), (6.45)
[466] ibid (6.522)
[467] ibid (4.01) ['The proposition is a picture of reality. The proposition is a model of reality as we think it is.']
[468] ibid (5.556)
[469] ibid (4.12); See also ibid 8 [Introduction] ['The essential business of language is to assert or deny facts. Given the syntax of a language, the meaning of a sentence is determinate as soon as the meaning of the component words is known. In order that a certain sentence should assert a certain fact there must, however the language may be constructed, be something in common between the structure of the sentence and the structure of the fact. This is perhaps the most fundamental thesis of Mr Wittgenstein's theory. That which has to be in common between the sentence and the fact cannot, so he contends, be itself in turn *said* in language. It can, in his phraseology, only be *shown*, not said, for whatever we may say will still need to have the same structure.']
[470] ibid (3.262) ['What does not get expressed in the sign is shown by its application. What the signs conceal, their application declares.']
[471] ibid (5.6) ['*The limits of my language* mean the limits of my world.']

our world and our viewpoint is essentially asymmetrical.[472] This observation stems from the parallel reading of proposition (6.421) on ethics and aesthetics, which 'cannot be expressed' as transcendental, and propositions (4.121) together with (4.1212).

> (4.121) Propositions cannot represent the logical form: this mirrors itself in the propositions.
> That which mirrors itself in language, language cannot represent.
> That which expresses *itself* in language, *we* cannot express by language.
> The propositions *show* the logical form of reality.
> They exhibit it.[473][…]
> (4.1212) What *can* be shown *cannot* be said.[474]

The logical form 'mirrors itself' in the propositions, but propositions cannot represent the logical form. In the third sentence of proposition (4.121) Wittgenstein adds emphasis to the words 'itself' and 'we'.[475] Wittgenstein juxtaposes the puissance of 'that which expresses *itself* in language' with our ability to meaningfully express it. The metaphysical subject, the 'philosophical I', or for present purposes a specific rendering of human beings' perspective, cannot express by language that which can – asymmetrically – express 'itself' in language. Language 'shows' but we cannot 'say' that which it 'shows'. Finally, under proposition (4.1212) the asymmetry is only intensified through the added emphasis and juxtaposition of the verbs 'can' and 'cannot'. That which '*can* be shown', simply '*cannot* be said'. Under proposition (6.41), Wittgenstein concludes, 'the sense of the world must lie outside the world.'[476]

> (6.41) […] In the world everything is as it is and happens as it does happen. *In* it there is no value—and if there were, it would be of no value.
> If there is a value which is of value, it must lie outside all happening and being-so [*So-Sein*]. For all happening and being-so is accidental.
> What makes it non-accidental cannot lie *in* the world, for otherwise this would again be accidental.
> It must lie outside the world.[477]

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[472] See *infra* the remarks on asymmetry in the thought of Emmanuel Levinas in Levinas, *Totality and Infinity*, 244 ['God sees the invisible and sees without being seen.']
[473] Wittgenstein (n 463) (4.121)
[474] ibid (4.1212)
[475] ibid (4.121) The German original reads: 'Was s i c h in der Sprache ausdrückt, können w i r nicht durch sie ausdrücken.'
[476] ibid (6.41)
[477] ibid

Wittgenstein notes, 'there can be no ethical propositions', because '[p]ropositions cannot express anything higher.'[478] Ethics and aesthetics cannot be expressed; can they be 'shown'? The metaphysical subject being identified with the limit, the sense in which this linguistic-analytical account communicates humanism is three-pronged. First, since all metaphysical subjects are the limit of the world, to wit, their world, and all propositions are of equal value, all can claim '*how* the world is', and their 'being-so' [So-Sein]. Second, since the mystical, '*that* [the world] is', signifies 'something always missing' apropos our field of sight and implies God's eye, our world is essentially limited. Reference to 'God' in the German Basic Law's Preamble can be understood in light of this elucidation as a guarantee of humanism and a gesture of anthropocentrism; it does not purport to declare faith in God or define who God is. Rather, it is about setting limits to human beings in recognition of their sameness as metaphysical subjects, and, at the same time, identifying them with the limit[479]. Third, logic (6.13), ethics and aesthetics (6.421) are transcendental.

The humanism that practicing the law of human dignity signifies can only be 'shown'. What then are we to make of what is 'said', namely of human dignity language and, more specifically, of the legal guarantee? Mindful of the danger of totalitarian, coercive systems 'garnished with humanistic feathers'[480], we must critically reflect on what is – to some extent improperly – 'said', and particularly on whether humanism is pursued in humane ways. Starck notes that only in respecting and protecting 'on the way' the concrete human being and his or her human dignity is the humane practice of the law – even the law of human dignity *per se* – guaranteed.[481] Starck's conclusion, 'These are political limits' [*Das sind Politikgrenzen*][482], brings to mind Rancière's thesis on politics and aesthetics and affirms the pertinence of the notion of the limit to portrayals of practice.

The introduced model is based on the graph of the eye and field of sight simile[483] (graph 2):

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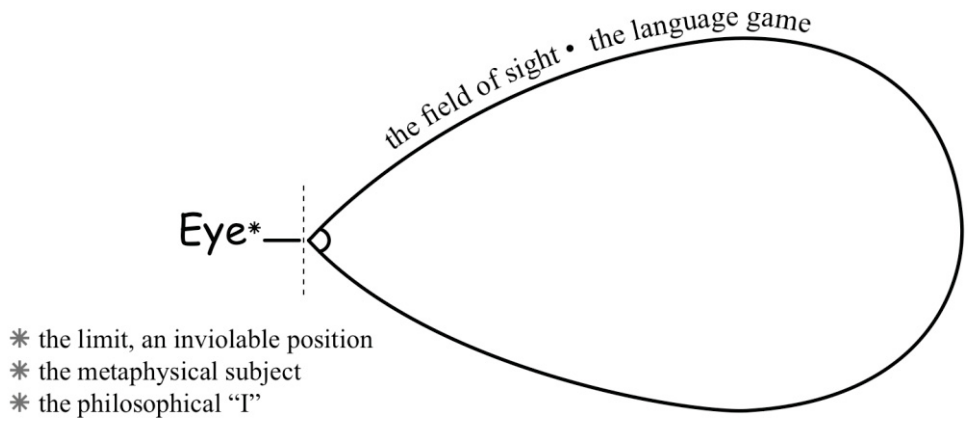
[478] ibid (6.42)
[479] Cf. Tatjana Geddert-Steinacher, *Menschenwürde als Verfassungsbegriff – Aspekte der Rechtsprechung des Bundesverfassungsgerichts zu Art. 1 Abs. 1 Grundgesetz* (Berlin: Duncker & Humblot, 1990) 60 ['Der Mensch ist sowohl dem Reich der Freiheit als auch dem Reich der Sinne verhaftet und muß deshalb stets hinter seiner Vernunftsbestimmung zurückbleiben. Er ist […] stets defizitär.']
[480] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 10
[481] ibid
[482] ibid
[483] Wittgenstein, *Tractatus,* (5.6331)



In judicial practice, the eye represents the judge[484]. The law, as a lens before the eye, establishes the critical perspective, forms the judge's viewpoint[485] and determines the judge's latitude for reasoning[486]. To the extent that the law as the lens before the eye constitutes language practiced in a text[487], the eye 'reads' this language and 'is continuously altered throughout the reading experience.'[488] This hermeneutic and literary approach aspires to depict the implications of entrusting authority over meaning to human beings representing institutions[489]. The perspective of the judge as

[484] The term 'judge' is understood in the broad sense as referring to the person or group of persons that represent the institution of the Court. With respect to the FCC, save the instances of minority opinions, the 'judge' would correspond to the Court. In other constitutional courts, such as the South African or the Canadian, where the different opinions in the decision are attributed to the person/judge/author, the term can refer to a particular judge. The *Vorverständnis* of the judge as interpreter influences the production of meaning; 'An interpretation is never a presuppositionless apprehending […].' Heidegger, *Being and Time* (1927, with a new Forward by Taylor Carman in 2008, John Macquarrie & Edward Robinson trs, New York: Harper & Row, 1962) 191

[485] Gadamer, *Truth and Method* (1975, 2004) 390 ['[…] one intends to *understand the text itself*. But this means that the interpreter's own thoughts too have gone into re-awakening the text's meaning. In this the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says. I have described this […] as a 'fusion of horizons'. We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author's, but common.']

[486] Constitutional law is formative of who the judge is and of how meaning is produced, for instance by provisions such as Art. 101 GG, Art. 103 GG, Art. 104 GG. See also Friedrich E. Schnapp, 'Die Grundrechtsbindung der Staatsgewalt' (1989) Heft 1 *JuS* 1, 8

[487] Practice in texts, indeed just an aspect of what practice entails, is perceived broadly, that is, should be understood as alluding also to the implicit presence of human dignity. Though a systematic inquiry into proof of implicitly present human dignity language in legal texts exceeds the objectives of my research question, it should be noted that legal scholarship has affirmed the implicit practice of the law of human dignity in documents such as the ECHR or the constitution of Canada. The point furthered here emphasizes the self as reader and the reflexive relationship between the reader and the text.

[488] Binder & Weisberg, *Literary Criticism of Law* (2000) 137; See Wolfgang Iser, *Der implizite Leser. Kommunikationsformen des Romans von Bunyan bis Beckett* (München: Wilhelm Fink Verlag, 1972)

[489] For instance Gadamer notes 'the painful imperfection associated with applying one's knowledge.' Gadamer, *Truth and Method* (1975, 2004) 316; Pierre Bourdieu, *Language and Symbolic Power* (John B. Thomson ed, Gino Raymond & Matthew Adamson trs, Cambridge, MA: Harvard University Press, 1991) 66 ['[…] utterances are not only […] signs to be understood and deciphered […]; they are also […] signs of authority to be believed and obeyed.']

author of the decision coincides in certain respects with the law as the critical lens. The coincidence is sharply discernable in FCC jurisprudence. Literary criticism sheds another light on the institutional style of the FCC as author: the syntactical choice of passive voice framing; the imperative utterance of what is valid in accordance with constitutional law, often without explicit reference to the FCC as the author – syntactically, as the subject – assessing constitutionality; and – a more crude and plain to see point – the institutional representation of individual constitutional judges not by their own person, but rather by Senates of the FCC, save in minority opinions. Partial concealment, in stylistic terms, of the author causes (an illusion of) coincidence between the *pouvoir constituant* or the will of society and the will of the constitutional judge.

Minding the linguistic-analytical insights presented so far, the eye of the judge looking through the lens of the law is not the sole viewpoint[490] traced in judicial decisions. To portray the meaning of the law of human dignity ensuing from intersecting fields of sight I turn to the text of decisions as a limited yet essential and illustrative aspect of judicial practice and borrow the concept of the language game. Despite the fact that language games are highly diverse[491] Wittgenstein talks about family resemblances[492]. The produced legal language game constitutes the material of the linguistic-analytical analysis. The legal language game intersects with a range of other language games most importantly those of human beings as legal subjects, as well as those of other legal actors across branches of state power, constitutional orders, and levels of constitutionalism. These are often integrated into the text of cases. Family resemblances, though discernible between legal and other language games in the texts discussed *infra*, are not spinal elements of this analysis.

A further modification of the above graph reflects the *sui generis* character of legal language games[493] and enhances the intelligibility of law as a totality. Imagine a narrower field that expands again from the eye within the eye's field of sight, in other words a subtotal of the field of sight. The boundaries of this subtotal are the

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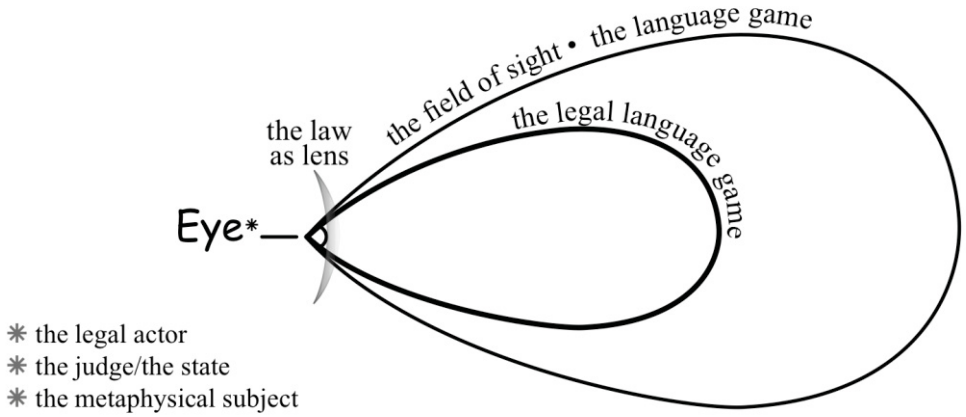
[490] See also Nehamas (1985) 1ff. [on Nietzsche's perspectivism and aestheticism]

[491] Wittgenstein, *Philosophical Investigations,* 15 para 23 ['It is interesting to compare the diversity of the tools of language and of the ways they are used, the diversity of kinds of word and sentence, with what logicians have said about the structure of language. (This includes the author of the *Tractatus Logico-Philosophicus*).']; Binder & Weisberg, *Literary Criticism of Law* (2000) 154 ['[…] linguistic conventions have soft edges. Linguistic categories are defined by family resemblances rather than shared characteristics. These 'resemblances' are historically contingent and so change with use.']

[492] Wittgenstein, *Philosophical Investigations,* 35-36 paras 66f.

[493] Alexy, *A Theory of Legal Argumentation* (1989) 50

boundaries of the legal language game. These, unlike the limits of our language, which can only be seen from a point outside our world, belong to the eye's field of sight. That said, defining the legal language game as a subtotal of the field of sight indicates a margin beyond its boundaries that allows for their expansion or contraction. The boundaries and the content of the legal language game are at the disposal of the legal actor, who – as a human being – is identified with the limit in the introduced linguistic-analytical model. Judges have both the field of sight and the legal language game at their disposal. If the good or bad willing of metaphysical subjects can change the limits of their language games, *ad majorem a minus* it can also change the limits of legal language games (graph 3):



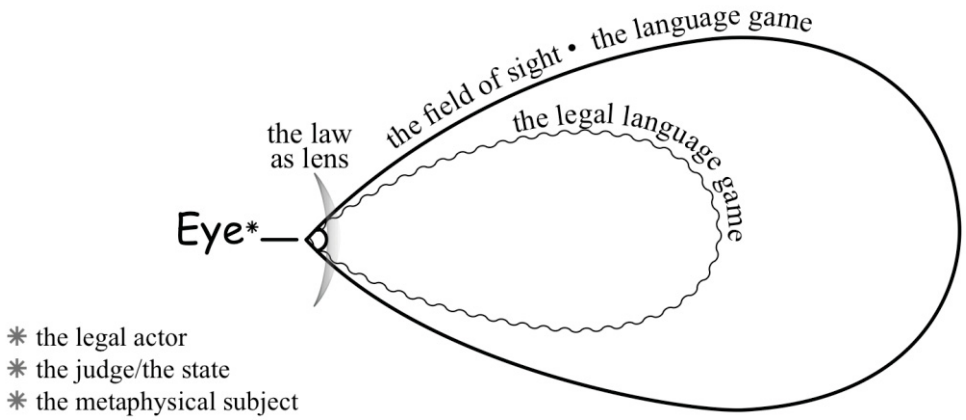
Other perspectives taken into account in producing the legal language game are subject – first in linguistic-analytical terms – to the authority of the judge as author of the legal text. Be that as it may, the doctrinal recognition of a claim to human dignity ensuing from Art. 1 sec. 1 GG could be understood as the granting of authority over meaning to another 'eye', that is, an alternative 'perspective' even against law *per se*. Each human being corresponds to an eye with its very own field of sight. The limit is an inviolable position, in other words an '*unantastbar*' place; paternalism lurks in the appeal to the inviolability of this position, rather than the inviolability of the metaphysical subject identified with the limit[494].

A range of institutional and doctrinal mechanisms that feature in the practice of the law of human dignity, ranging from constitutional review and judicial restraint to the principle of proportionality, introduce certain language into the legal language game: 'review', 'restraint', 'principle', 'proportionality'. Zooming in on the language

[494] v. Olshausen (1982) 2221

found in legal doctrine[495] through a hermeneutic and literary methodological lens can be perceived as post-modern criticism.[496] Having said that, the uniformity, impartiality, certainty, coherence and foreseeability of doctrine as standardized language render law graspable and, in democratic constitutional orders, define how judges should exercise their authority over meaning in interpreting the law and in constructing legal arguments, thus contribute to the soundness of justification.

Bearing in mind that the legal language game is narrower than the field of sight that represents the eye's perception of life[497], hence its boundaries can afford to fluctuate, how does the breadth of this subtotal increase or decrease? The fluctuation of the boundaries of the legal language game can be associated, indicatively, with the interplay between internal and external justification of legal arguments composing legal syllogisms produced in practicing the law of human dignity, or the need to transcend disciplinary borders, questing after the context of a given *Leerstelle*, in order to extract insights and methodologies for assessing *ad hoc* its meaning (graph 4):



[495] Hendrik Zahle, 'Legal Doctrine between Empirical and Rhetorical Truth. A Critical Analysis of Alf Ross' Conception of Legal Doctrine' (2003) 14(4) *EJIL* 801, 802 [legal doctrine is composed of propositions about legal norms]; 806 [verification or falsification of propositions of legal doctrine by inquiry into the reasoning of the courts 'under specific conditions]; ibid 809 ['The fact that statements about law are made in a social context implies that the statements themselves influence the law.']; ibid 812f. ['We are involved in a rhetorical study of the impact of statements of legal science. The greater the authority of the scholar, the more adequate the presentation of the statement, the more fitting to the practical need for guidance the statement is framed, the higher is the chance that the statement is 'followed' or rather – in the words of a verification procedure – will turn out to be 'true' in the sense that law is decided as stated.']; ibid 815 ['[According to Ross] […] legal doctrine somehow creates its own object and thereby contributes to its own truth. Consequently legal doctrine has a 'magical' element.']

[496] Butler, *Feminism and the question of postmodernism* (1992) 15 ['[T]o call into question and perhaps most importantly, to open up a term, like the subject, to a reusage or redeployment that previously has not been authorized.']

[497] Wittgenstein, *Tractatus,* (5.621) ['The world and life are one.']

Two disparate, yet illustrative, examples of figuratively rendered fluctuation, as in the above graph, can be offered. In German legal scholarship it is argued that the legal guarantee of human dignity marks *Tabugrenze* [taboo limits][498], which exclude from the protective scope of human dignity instances of 'exaggerated sensitivity' and unreasonableness[499], therefore setting – in light of the seriousness of the guarantee – limits to subjective estimations[500] of what amounts to a violation of human dignity.[501] Another example of fluctuation of the breadth of legal language games indicates how drastically the boundaries are influenced by methodological choices. Comparative and multi-, inter- or transdisciplinary approaches to law reflect openness[502], namely willingness to look at law from another perspective and to integrate other (legal) language games into the produced legal language game.

> (6.423) Of the will as the bearer of the ethical we cannot speak. And the will as a phenomenon is only of interest to psychology.
> (6.43) If good or bad willing changes the world, it can only change the limits of the world, not the facts; not the things that can be expressed in language.
> In brief, the world must thereby become quite another. It must so to speak wax or wane as a whole.
> The world of the happy is quite another than that of the unhappy.[503]

In *Philosophical Investigations* Wittgenstein states, '[…] to imagine a language means to imagine a form of life.'[504] Can the limits of the world, of life and,

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[498] Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857, 860; Harro Otto, 'Diskurs über Gerechtigkeit, Menschenwürde und Menschenrechte' (2005) *JZ* 473, 480f. [on torture]
[499] Kunig, Art. 1, *GG Kommentar* (2012) para 23
[500] Binder and Weisberg propose looking at literature and law in approaches importing the former into the latter as 'potential collaborators or competitors in the same enterprise […]' and note that 'the disciplines perform this dual function of disciplining both social investigators and the objects of social investigation, insofar as they are modes of apprehending subjectivity.' The emphasis on subjectivity and the position that 'legal decisions turn on diverse representations of the *will* of legal actors' mark how the hermeneutic and literary methodological approach denotes an actor-oriented view on law in that it treats subjectivity, namely the result of the presence of the human factor in law's practice. In Binder & Weisberg, *Literary Criticism of Law* (2000) 5 f.
[501] Kunig (n 499)
[502] White, *Heracle's Bow* (1985) 124 [openness as 'many-voicedness']
[503] Wittgenstein, *Tractatus,* (4.23), (4.3)
[504] Wittgenstein, *Philosophical Investigations*, 11 para 19; Contrary to the 'controversial feature of the Saussurian conception of the sign system as a discrete body of rules […] that […] gives the system a definite boundary […]', in *Philosophical Investigations* Wittgenstein argues 'for the instability of sign systems, which he calls 'language games'. Since meaning is use in his pragmatist scheme, understanding a sign means competence in using it in a discourse. Such discourses do not have hard boundaries – the range of moves that may be recognized as going on with a linguistic practice, as 'within the rules,' cannot be exhaustively specified in advance and is contingent on the responses of other participants in the game. […] Wittgenstein concludes, 'the extension of [any given] concept is not closed by a frontier.'' [as translated in: Ludwig Wittgenstein, *Philosophical Investigations* (Gertrude E. M. Anscombe tr, New York: Macmillan, 1968) Part 1, 67 para 2e; This translation deviates from the revised 4th edition of the *Philosophical Investigations* used here: in the revised 4th

essentially, also of law change through the practice of the law of human dignity? A response to this question can only be given on occasion of linguistic-analytical analysis of *ad hoc* instances of practice (see *infra* in Chapter Two). The legal language game expanding from the eye is infused with the law of human dignity and fundamental rights. Law permeates the content and the boundaries of legal language games. Law as the critical lens through which the eye, the constitutional judge, looks forms the respective viewpoint. In light of Art. 1 sec. 3 GG, fundamental rights are, primarily and indispensably, lenses influencing the production of meaning by all three manifestations of state power (Art. 20 sec. 2 GG[505], Art. 20 sec. 3GG).[506]

Linguistic-analytical insights set the stage for the phenomenological account of 'something missing', and reinforce the ontological inquiry into the law of human dignity. The 'human' component of human dignity language denotes the metaphysical subject. The legal actor, the human within the institution, stands for the metaphysical subject. The linguistic-analytical insight that all propositions are of equal value and metaphysical subjects are the limit of the world as in the *Tractatus Logico-Philosophicus* elucidates the justification of self-determination and autonomy at the core of human dignity meaning. Pluralism is premised on the proposition that all human beings are as such the limit of their world: human beings are the same precisely and leastwise in that they are diverse and unique.

The responsibility of the judge to develop an understanding of the world of human beings as metaphysical – prior to and besides legal – subjects becomes all the more compelling in view of the appreciation that man-made[507] law is limited. Despite the spatial coincidence of the eye of the judge with the law as the decisive lens in the introduced model, the human factor within the institution[508], namely the metaphysical subject at the limit of the (legal) language game, should not escape our attention. The humane practice of law presupposes entrusting law's grasp to human beings; whether this possibility effectuates depends on the process of practicing the law of human dignity and the ethics and aesthetics applied in the propositions produced among other factors.

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edition 'frontier' is substituted with 'boundary').] See also Binder & Weisberg, *Literary Criticism of Law* (2000) 122 f [on the quality of the boundaries drawn].

[505] Schnapp (1989) 1, 8

[506] ibid 1

[507] Gender alert! Man-made stands for 'human'-made.

[508] Baer, 'Thematisierungen – Körper, Sprache und Bild im Prozeß' (2003) 109, 117

What can be 'said', and what can only be 'shown' and not 'said' in the practice of the law of human dignity? The question itself is an oxymoron: how can I discuss something that cannot be 'said' but only 'shown'? The philosophy of Wittgenstein is an invaluable source of philosophical insights for addressing such epistemological challenges to eventually render the discussion about 'something always missing', namely something that can only be 'shown' and not 'said', a sound analytical endeavor. Pre-ethics, a meticulous account of what is only 'shown' and not 'said', are discussed in the succeeding part of the analysis, even if spelling them out only builds another ladder, which should, once ascended, be discarded.[509]

C. A phenomenological account of practicing the law of human dignity

The neutral and impartial[510] relational portrayal of the practice of human dignity language in law ensuing from concepts such as the 'philosophical I', or the 'metaphysical subject' in the *Tractatus Logico-Philosophicus* sets the stage for processing, hermeneutically and literary, phenomenological insights derived from the work of Emmanuel Levinas, particularly *Totality and Infinity – An Essay on Exteriority*[511], to further enhance the introduced model. Levinas depicts the experience of human being-ness in its metaphysical etherealness; still, at the same time, in its concreteness. Hospitality[512], generosity, responsibility, desire for a face-to-face encounter with the absolutely other and the Other are examples of the language employed in *Totality and Infinity*. Levinas' phenomenology is apt for the cultivation of another understanding of how the law of human dignity is practiced and the enrichment of the analysis of FCC jurisprudence in Chapter Two. *Totality and Infinity* introduces an original phenomenology that deviates from hermeneutic philosophy of

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[509] Wittgenstein, *Tractatus* (6.54)

[510] See critical stance towards neutrality and impartiality in Levinas, *Totality and Infinity*, 12 [Introduction by John Wild]

[511] In *Totality and Infinity* Levinas reflects and builds on former scholars such as Husserl and Heidegger. Levinas, ibid 43 ['In subordinating every relation with existents to the relation with Being the Heideggerian ontology affirms the primacy of freedom over ethics. To be sure, the freedom involved in the essence of truth is not for Heidegger a principle of free will. Freedom comes from an obedience to Being: it is not man who possesses freedom; it is freedom that possesses man. But the dialectic which thus reconciles freedom and obedience in the concept of truth presupposes the primacy of the same, which marks the direction of and defines the whole of Western philosophy.']; 305 ['To posit being as Desire is to decline at the same time the ontology of isolated subjectivity and the ontology of impersonal reason realizing itself in history.']

[512] 'Has anyone noticed? Although the word is neither frequently used nor emphasized within it, *Totality and Infinity* bequeaths to us an immense treatise *of hospitality*.' Jacques Derrida, *Adieu to Emmanuel Levinas* (Pascale-Anne Brault & Michael Naas trs, Stanford, CA: Stanford University Press, 1999) 21

Being and transcendental idealism[513], showing 'the inexhaustible richness of our lived experience and the fruitfulness of reflecting on its forms and patterns.'[514]

In the Preface to *Totality and Infinity*, Levinas reacts to the cryptic reference to the *polemos* in the thought of Heraclitus and states that war establishes a totality order that precludes exteriority and is experienced as deadlock.

> We do not need obscure fragments of Heraclitus to prove that being reveals itself as war to philosophical thought, that war does not only affect it as the most patent fact, but as the very patency, or the truth, of the real. […] The ontological event that takes form in this black light is a casting into movement of beings hitherto anchored in their identity, a mobilization of absolutes, by an objective order from which there is no escape. The trial by force is the test of the real. […] [War] establishes an order from which no one can keep his distance; nothing henceforth is exterior.[515]

Dissensus, by analogy with the *polemos*, as a mode of critical reflection presupposes the totality of 'an objective order from which there is no escape'.[516]

> War does not manifest exteriority and the other as other; it destroys the identity of the same.
> The visage of being that shows itself in war is fixed in the concept of totality, which dominates Western philosophy. Individuals are reduced to being bearers of forces that command them unbeknown to themselves.[517]
> Totality absorbs the multiplicity of beings, which peace implies. Only beings capable of war can rise to peace. War like peace presupposes beings structured otherwise than as parts of a totality.[518]

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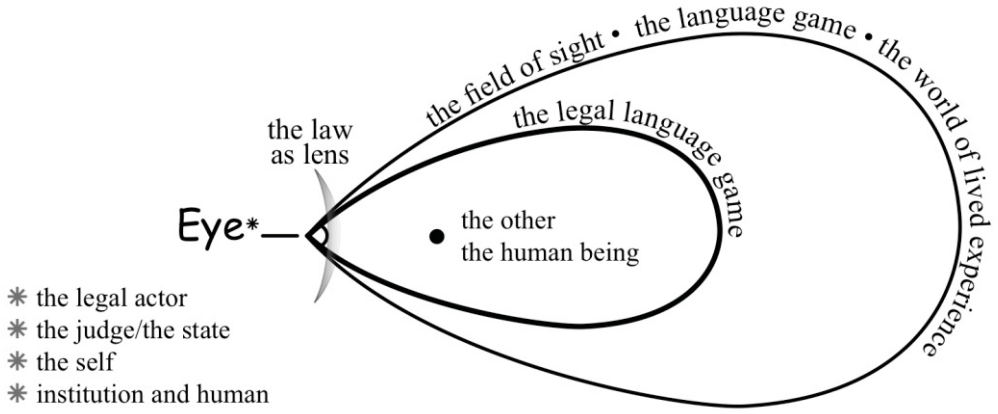
[513] Levinas, *Totality and Infinity*, 12 [Introduction by John Wild]
[514] ibid
[515] ibid 21
[516] See an original interpretation of escape in Levinas, *On Escape/De L' Evasion*, 52 ['This term *escape,* which we borrow from the language of contemporary literary criticism, is not only a word à la mode; it is word-weariness, the disorder of our time [*mal du siècle*]. It is not easy to draw up a list of all the situations in modern life in which it shows itself. […] What is caught up in the incomprehensible mechanism of the universal order is no longer the individual who does not yet belong to himself, but an autonomous person who, on the solid terrain he has conquered, feels liable to be mobilized – in every sense of the term. […] Temporal existence takes on the inexpressible flavor of the absolute. The elementary truth that *there is being* – a being that has value and weight – is revealed at a depth that measures its brutality and its seriousness. […] It is not that the sufferings with which life threatens us render it displeasing; rather it is because the ground of suffering consists of the impossibility of interrupting it, and of an acute feeling of being held fast [*rivé*]. The impossibility of getting out of the game and of giving back to things their toy-like uselessness heralds the precise instant at which infancy comes to an end, and defines the very notion of seriousness. What counts, then, in all this experience of being, is the discovery not of a new characteristic of our existence, but of its very fact, of the permanent quality [*l' inamovibilité*] itself of our presence […].']
[517] Levinas, Totality and Infinity, 21
[518] ibid 222

The notion of totality is reintroduced in a most vibrant fashion. The preclusion of escape brings about the human experience of deadlock, which manifests recurrently in the portrayal of human dignity violations in courts' jurisprudence. The above excerpt acquaints us with a particular experience of deadlock operating chiefly at the level of language as the basis of society, communication and meaning, namely the state of being subject to the authority of forces unbeknown to oneself in spite of oneself. An important facet of this experience is ignorance emboldened by elusiveness, ambiguity, controversy, or lack of transparency re meaning and the 'forces' that produce it. Failing to clearly identify who speaks and to communicate as transparently as possible the meaning produced to those at the receiving end are tantamount to the subsumption of human beings subject to such authority under a totality from which there is no escape.

The world is one of 'alien things and elements which are other than, but not negations'[519] of the self. The appropriation of the field of sight simile in the introduced model indicates who has authority over meaning, hence inevitably over other subjects with their own worldviews; the phenomenological insights herein elucidate what precedes such authority and, at once, decides whether it is exercised humanely. The totality structure of the legal language game produced by the judge is the crucial subtotal of the field of sight for present purposes, in view of the material attended to in Chapter Two (graph 5):



Far from resembling the neutral, impartial, system[520] of the eye and the field of sight simile, Levinas notes, 'the world as I originally experience it is not a logical

[519] ibid 12 [Introduction by John Wild]
[520] ibid

system of this kind, in which no term takes precedence over the rest.'[521] Levinas' remark points to the necessity of complementing the model with language that affords tools for portraying the richness of lived experience unveiled in practicing the law of human dignity and filling 'something missing' with concrete content.

'Language is exceptional in that it attends its own manifestation.'[522] The legal language game[523] entails both the action of producing meaning and the meaning produced, '*signifiance*', 'the saying that is correlated with something said'[524]. Legal language games can be portrayed as totalities. The linguistic-analytical account indicates how the practice of the law of human dignity – at least those aspects of practice evidenced in legal texts – corresponds essentially to a subtotal of legal actors' actual vision. Law ubiquitously permeates the viewpoint emanating from the metaphysical subject at the limit of the world, the boundaries, and the content of legal language games. There are, indeed, good reasons why law should be partly instituted as a totality. Totality structures afford, for instance, certainty, coherence and consistency. This holds true for the practice of human dignity not only in positive law, but also in case law, where it manifests most potently in the advantages of employing elaborate legal doctrine on the legal concept in German constitutional law.[525]

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[521] ibid
[522] ibid 98
[523] Cf. Austin, *How to Do Things with Words* (1962) [speech acts]
[524] John Llewelyn, 'Levinas and Language' in Simon Critchley & Robert Bernasconi (eds), *The Cambridge Companion to Levinas* (Cambridge, UK: Cambridge University Press, 2002) 119, 132; Levinas, *Totality and Infinity,* 14 [Introduction by John Wild] ['There is no difference between the active expression and what is expressed. The two coincide. The other is not an object that must be interpreted and illuminated by my alien light. He shines forth with his own light, and speaks for himself.']
[525] Critically, offering historical insights, Lieber, *Legal and Political Hermeneutics*, 40-42 ['It has not escaped the observation of the lawgivers of different nations, that owing to the different interpretation, put upon the same laws, much vexation and trouble arise. In fact, the "uncertainty of the law," which originates in a great measure from the different interpretation to which one and the same law may be subject, has become proverbial. It has been, therefore, the anxious desire of several well-disposed legislators, to avoid interpretation and consequent commentaries, by framing codes of law which should be so complete and exact as to render interpretation superfluous. To diminish litigation, and to make lawyers comparatively useless, was one of the objects of the Prussian code, promulgated by Frederick the Great. […] Napoleon said […] that be once entertained the idea, that all principles of law might be reduced to a few concise forms, which ought to be combined accordingly to fixed rules, similar to those of mathematics; and that thus simplicity and certainty of law might be established. He soon, however, gave up the idea […]. In Bavaria, commentaries on the penal code are actually prohibited. With true wisdom did the government of that country officially publish the motives, explanations, &c., which were given in the course of the discussions in the king's privy council, for adopting the various laws. They have been drawn up and reduced to a systematic whole […]. But it was not equally wise to prohibit commentaries; for those who advised the king so to do, forgot, that as they felt bound to explain the various provisions of the code, so would their own explanations again carry along with them the necessity of interpretation, simply because drawn up in human language, though we willingly allow, not in the same degree with the briefer code. No code can possibly provide

Be that as it may, the practice, namely mobilization, of human dignity language in law effectuates, I argue due to the immediacy of the concept's linguistic and semantic relatedness to human being-ness, a crack in law's totality. This crack, the 'breach of totality'[526], is like a vent or a window that enables law's openness towards infinity, to wit, allows for the practice of law's meta-dimension and activates the metaphysical quality of law's *Menschenbild*. Perceiving of the 'breach of totality' as an aspect of human dignity meaning profoundly refines constitutional claims to respect and protection of human dignity. The transcendental meaning of the law of human dignity is practiced when, first and foremost, definitional – here, also, figurative – provision for the Other beyond is made; only then can transcendence as transascendance in encountering the other face-to-face make sense. The crack in the totality guarantees the humane practice of law in general, on account of the prominent position of the human dignity clause in the Basic Law, the encapsulation of the self-understanding of the German state in Art. 1 sec. 1 GG, and the doctrinally postulated *Ausstrahlungswirkung* (radiation impact) of human dignity on other fundamental rights.

How does Levinas define totality and infinity? The 'panoramic sense of vision'[527] is associated with a totalizing understanding of the other human being and the world. 'Synoptic thought' inevitably totalizes.[528] 'Vision is an adequation of the idea with the thing, a comprehension that encompasses',[529] thus diametrically opposed to the transcendent, namely 'what can not be encompassed'[530]. Affirmation of or opposition to a condition 'while remaining attached to its horizons'[531], the 'yes' and the 'no', positivity and negativity, take place within the boundaries of totality. Human history recurrently documents 'outwardly directed but self-centered totalistic thinking.'[532] Totalizers 'are satisfied with themselves and with the systems they can

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for all specific cases, which most frequently consist of a combination of simple elements; nearly every case in reality is a complex one; and because the various relations of men are forever changing.']

[526] Levinas, *Totality and Infinity*, 40

[527] ibid 16 [Introduction by John Wild]

[528] ibid 40

[529] ibid 34; ibid 295 ['For vision is essentially an adequation of exteriority with interiority: in it exteriority is reabsorbed in the contemplative soul and, as an *adequate idea,* revealed to be a priori, the result of a *Sinngebung*.']

[530] ibid 293 ['This is an essential precision of the notion of transcendence, utilizing no theological notion.']

[531] ibid 41

[532] ibid 17 [Introduction by John Wild]

organize around themselves as they already are […]'.[533] They 'seek power and control'[534], 'order and system'.[535] Totalities are associated with objectivity and with valuing objective thinking[536] and neutrality. Questions regarding the Being are treated 'in terms of a context, a system.'[537]

> The acts of sensing, thinking, existing, as they are lived through, are discounted as subjective. […] To be free is to sacrifice the arbitrary inner self and to fit into a rationally grounded system. Inner feelings and thoughts cannot be observed. They are private and unstable. So men are judged by what they do, their works that are visible and remain. Since they endure, they can be judged by the group which also remains. They are what they are judged to be by the ongoing course of history. Since this is the inclusive system, with nothing beyond, there is no appeal from this judgment. It is final. As Hegel said, *Die Weltgeschichte ist die* [sic] *Weltgericht.* History itself is the final judge of history.[538]

Common sense and philosophy 'from Plato to Heidegger', contends Levinas, have deemed 'panoramic existence and its disclosure' equivalent to 'the very production of being'.[539] Levinas considers Heidegger's thesis 'that every human attitude consists in 'bringing to light' […]' to be a manifestation of the 'primacy of the panoramic.'[540] The breach of totality is elemental to the actual existence of being, rather than merely expressive of disobedience against totality structures; it concerns the essential core meaning of 'human' in human dignity language.

> The break-up of totality, the denunciation of the panoramic structure of being, concerns the very existing of being and not the collocation or configuration of entities refractory to system.[541]

Notwithstanding this evidently critical stance towards totality structures, Levinas grants they are an indispensible feature of lived experience, since 'a great part of our speaking and thinking is systematic and bound by logic of some kind.'[542] The realization of justice through law, this *sui generis* facet of lived experience,

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[533] ibid
[534] ibid
[535] ibid
[536] ibid 17-18 [Introduction by John Wild] ['A priority is […] placed on objective thinking, and the objective.']
[537] ibid
[538] ibid
[539] ibid 294
[540] ibid
[541] ibid
[542] ibid 14; ibid 18 ['Systematic thinking, no doubt, has its place.'] [Introduction by John Wild]

undoubtedly requires totality structures. Uniformity[543], certainty, coherence, foreseeability of outcomes, and determinacy re the standards guiding law's practice are only conceivable within totality frameworks. Having said that, rigid boundaries that signify a 'partial and biased doctrine'[544] impair the transcendental meaning of the law of human dignity. Far from thoroughly rejecting the value and necessity of totality systems in the practice of human dignity and fundamental rights it suffices at this point of the analysis to view totality structures and traits as just one side of the story.

In the work of Levinas, infinity, the other side of the story, is identified with emptiness, 'the void that breaks the totality'[545], an 'apparently wholly empty notion'[546] analogous to the presently introduced conception of 'something always missing'. The breach of totality relies, instead of vision[547], on language, 'where there is always room for the diversity of dialogue, and for further growth through the dynamics of question and answer.'[548] The precedence of language over vision in the phenomenology of Levinas directly opposes the 'primacy of the panoramic'[549] implied, for instance, in Heiddegger's interpretation of Heraclitus' fragment 123 (see *supra*, Part A), and conveys the abandonment of the position 'that disclosure, which implies the solitude of vision, is the first work of truth.'[550] Expression is never neutral[551]; on the contrary, it breaches 'all the envelopings and generalities of Being' to display 'its "form" the totality of its "content", finally abolishing the distinction between form and content.'[552] Content and form merge in that they are both signified

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[543] See MacKinnon, *Are Women Human?* (2006) 51
[544] Levinas (n 526) 18 [Introduction by John Wild]
[545] ibid 40
[546] ibid 50
[547] Reference to 'vision' brings to mind the linguistic-analytical metaphor of the eye and the field of sight.
[548] Levinas (n 526) 16 [Introduction by John Wild] ['This other-regarding way of thought rejects the traditional assumption that reason has no plural, and asks why we should not recognize what our lived experience shows us, that reason has many centers, and approaches the truth in many different ways. Instead of building great systems in which the singular diversities of things and persons are passed over and diluted, this way of thinking prefers to start with the careful analysis of the peculiar features of each being in its otherness, and only then to clarify its relations with other things in the light of its peculiar and distinctive features.']
[549] ibid 294; ibid 15 [Introduction by John Wild] ['Totalitarian thinking accepts vision rather than language as its model. It aims to gain an all-inclusive, panoramic view of all things, including the other, in a neutral, impersonal light like the Hegelian *Geist* (Spirit), or the Heideggerian Being. It sees the dangers of an uncontrolled, individual freedom, and puts itself forth as the only rational answer to anarchy.']
[550] ibid 99
[551] MacKinnon, *Are Women Human?* (2006) 52f.
[552] Levinas (n 526) 51

as the distance between the self and the other and Other, which 'unlike all distances, enters into the *way of existing* of the exterior being'.[553]

Infinitizers, 'who are dissatisfied, and who strive for what is other than themselves'[554] pursue 'a higher quality of life'[555], 'freedom and creative advance'[556]. Levinas' proposal for approaching infinity shuns both 'subjective anarchism'[557] and 'the holistic thinking of traditional philosophy'[558] in that it opts for language. Language capacitates diversity in conversation. Seeing that 'judgment is crude and subjective, varying with the otherness of those who judge differently from place to place and from time to time […]'[559] should lead us to never consider it final; 'history itself is not the final judge of history.'[560]

Levinas draws a link between the idea of the perfect and infinity. Perfection transcends the limit of 'the common plane of the *yes* and the *no*'[561] and the idea of infinity 'designates a height and a nobility, a transascendence.'[562] Analogously to the 'Cartesian primacy of the idea of the perfect over the idea of the imperfect'[563], argues Levinas, the idea of infinity cannot be reduced to 'the negation of the imperfect'[564], because 'negativity is incapable of transcendence'[565]. In language neither the 'yes' nor the 'no' are 'the first word'.[566] Polarization, negativity and positivity, falsification and verification, as well as subsumption under categories are conceivable only in totality structures. Locating the infinite outside 'the common plane of the *yes* and the *no*' amounts to a genuinely affirmative stance towards 'something always missing'.

An exceptional quality of the idea of infinity is 'that its *ideatum* surpasses the idea'[567]. Just like the transcendent, what cannot be encompassed, infinity overflows the idea of infinity and sets in motion the process of critical reflection and self-

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[553] ibid 35 ['Its formal characteristic, to be other, makes up its content. Thus the metaphysician and the other cannot be *totalized*. The metaphysician is absolutely separated.']
[554] ibid 17 [Introduction by John Wild]
[555] ibid
[556] ibid
[557] ibid 15 [Introduction by John Wild]
[558] ibid 15-16 [Introduction by John Wild]
[559] ibid 18 [Introduction by John Wild]
[560] ibid 19 [Introduction by John Wild]
[561] ibid 41
[562] ibid; ibid 35 [Transcendence 'is necessarily a transascendence.']
[563] ibid 41
[564] ibid
[565] ibid
[566] ibid 42
[567] ibid 49; ibid 289 ['[…]the social relation, the idea of infinity, the presence in a container of a content exceeding its capacity, was described in this book as the logical plot of being.']

reflection on the 'spontaneous freedom within us'.[568] Are there limits to the inner spontaneous freedom? The question relates to the understanding of 'God' in the Preamble to the Basic Law as 'something always missing' apropos to the notion of the limit, and to the justification of the limited character of positive law. Since the law of human dignity encapsulates the infinite, an assertion that becomes more intelligible upon focus of the 'human' component of 'human dignity', this surpassing among different levels of meaning is an inherent quality of that law and determinant of practice. The notion of human dignity surpasses the law of human dignity itself[569], and the *ideatum* of human dignity surpasses the idea of human dignity. The distance between *ideatum* and idea at the same time means that critical reflection, a process requiring distance, is intrinsic to the practice of human dignity in law. Levinas observes,

> […] we could conceivably have accounted for all the ideas, other than that of Infinity, by ourselves. […] The distance that separates *ideatum* and idea here constitutes the content of the *ideatum* itself. […] The transcendent is the sole *ideatum* of which there can only be an idea in us; it is infinitely removed from its idea, that is, exterior, because it is infinite.[570]

Infinitizers perceive totality as violence originating 'in the permanent tyranny of power systems which free men should resist'[571]. Levinas asserts that violence does not eventuate predominantly in 'injuring and annihilating'[572] human beings, but rather 'in interrupting their continuity, making them play roles in which they no longer recognize themselves, making them betray not only commitments but their own substance, making them carry out actions that will destroy every possibility of action.'[573] Margalit offers an apt, quite extraordinary, yet historically accurate example of Jews in concentration camps digging holes just to fill them up again. The humiliation corresponds to both aforementioned senses of violence. It is more than just tantamount to a deviation from the categorical imperative never to treat human beings only as means, but also as ends; it rather involves treating them not even as

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[568] ibid 51
[569] Starck, Präambel, *GG Kommentar* (2010) para 36ff.; Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 14; ibid 10
[570] Levinas, *Totality and Infinity*, 49
[571] ibid 18 [Introduction by John Wild]
[572] ibid 21
[573] ibid

means.[574] Still, Levinas notes, '[v]iolence bears upon only a being both graspable and escaping every hold.'[575] Infinity is not the negation of totality; the two terms are logically mutually dependent.

It is critical, for present purposes, to adumbrate a phenomenological account of three patterns of relation, essentially from the first-person point of view: the self as self and as other to the self, the self and the other as Other[576], and the self and the world.[577] The three patterns are laid out to aid the portrayal of these relations as they surface in instances of FCC jurisprudence (Chapter Two) in line with the insight that 'law […] [is] an arena for the performance and contestation of representations of self and […] an influence on the roles and identities available to groups and individuals in portraying themselves.'[578] Finally, the world as alterity, 'the bread I eat, the land in which I dwell, the landscape I contemplate, […] sometimes, myself for myself […]'[579] is sharply distinguished from the metaphysically desired other as Other[580]. 'Their *alterity* is […] reabsorbed into my own identity as a thinker or a possessor.' [581] At once this remark explains how the self relates to the world, and how the self relates to the self. In self-reflection, the alterity encountered is reabsorbed into the identity of the self; the self evolves in circularly rendering the own otherness same and one's own. Where certainty and foreseeability foreclose significantly the possibility of encountering the alterity that disrupts the identity in the process of self-reflection, tools and mechanisms should be invented and applied for setting in motion that process.[582]

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[574] Margalit, *The Decent Society* (1996) 103f. [treating human beings as subhumans]
[575] Levinas (n 570) 223
[576] The 'other' and the 'Other' are used interchangeably by Levinas due to their coincidence in the face-to-face relation, presented *infra*.
[577] The phenomenological account of the relation of the self to the world can be enhanced by ontological and linguistic-analytical insights. The world, according to the linguistic-analytical model based on the eye and the field of sight simile in the *Tractatus Logico-Philosophicus*, is defined by the limits of our language; Thurner (2001) 206 [Thurner's interpretation of Fragment B101 of Heraclitus notes how self-knowledge [*Selbsterkenntnis*] can only be attained through reflection on language, namely the world: 'Da die Sprache die Weise ist, in der der Mensch sich in seinem konkreten Lebensvollzug immer schon erschlossen ist, kann die Selbsterkenntnis nur als Reflexion über die Sprache Gestalt gewinnen.']
[578] Binder & Weisberg, *Literary Criticism of Law* (2000) 463
[579] Levinas, *Totality and Infinity,* 33
[580] ibid
[581] ibid
[582] Constitutional review and the principle of the separation of powers can be understood as a mechanism of self-reflection of the constitutional state; also, comparative insights and inter- and transdisciplinary approaches in practicing the law are active ways of seeking to encounter the other in order to inform the same. Finally, doctrinal tools such as the *Objektformel* materialize, at the level of language and meaning, what is 'other than' human, and 'other than' the language and meaning of

The 'relation with exteriority', metaphysics, is a relation between the finite, that is, the limited, and the infinite, which transcends any and all limits. The dynamics resulting from reference to 'God' in the Preamble to the German Basic Law can be perceived in light of the insight that 'the relation between the finite and the infinite does not consist in the finite being absorbed in what faces him[583], but in remaining in his own being, maintaining himself there, acting here below.'[584] This insight evokes the disjunction of gods and human beings and the inviolability signified by the limit as discussed respectively in the ontological and linguistic-analytical accounts *supra*.

> Infinity is characteristic of a transcendent being as transcendent; the infinite is the absolutely other.[585]

Absoluteness features dominantly in the legal literature on human dignity and in the judicial practice of the legal concept. The twist on the relation between the self and the other in Levinas' phenomenology is the coincidence of the other and the Other on the human face on account of the transcendent quality of human being-ness, in other words the partaking of his or her being-ness to infinity. The self's face-to-face encounter with the metaphysical other 'is not formal, is not the simple reverse of identity, and is not formed out of resistance to the same, but is prior to every initiative, to all imperialism of the same.'[586] As Natalia Petrillo notes, shedding light on the distinction between the descriptive and prescriptive meaning of human dignity in legal discourse, or the fact and the law of human dignity as I put it, the fact underlying human rights according to Levinas is the ethical relationship of the face-to-face.[587]

Encountering the other does not fulfill a need, does not seek 'to fill a negation or lack in the subject'[588]; rather it is sparked by a desire, argues Levinas, 'for that which transcends me and my self-centered categories'[589]. This desire 'seems

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human dignity in the Basic Law, hence disrupting a sterilized concept by assuming a darker, yet real, possibility of violations and degrading objectification. Treating instances of contended objectification in the practice of the law of human dignity amounts to an absorption of the other into the same, the latter being defined in light of the absolute guarantee of human dignity in Art. 1 sec. 1 GG.

[583] Gender alert!

[584] Levinas (n 579) 292

[585] ibid 49

[586] ibid 38-39

[587] Natalia Petrillo, 'Phänomenologische Ansätze zur Menschenwürde' in Jan C. Joerden & Eric Hilgendorf & Felix Thiele eds, *Menschenwürde und Medizin – Ein interdisziplinäres Hanbuch* (Berlin: Duncker & Humblot, 2013) 135, 140

[588] Levinas (n 579) 19 [Introduction by John Wild]

[589] ibid 16 [Introduction by John Wild]

insatiable'[590] and 'feeds on itself'[591]. Desire is the undercurrent of the mutual dependence between law's humanism and pragmatism. The schematic parallelization of humanism and pragmatism to the literary and the legal as performed in the *infra* excerpt aim to enhance the comprehension of the relation between desire and language. The story of interpretation in American legal thought frames the context of the following remarks:

> Before the development of a modern conception of subjectivity as desire, legal discourse and literary discourse were subsumed within an undifferentiated activity of literate reflection. Law had institutional embodimens, but because of its customary source of legitimacy, it transcended those embodiments; and literature did not yet exist as a separate category of letters. Interpretation played an uninteresting role in premodernist legal thought. Identifying and applying the law were commonly experienced as processes of customary judgment, not as the interpretation of sovereign will. Accordingly legal judgment was not seen as remote from, or in a semiotic relation to, virtue.
> The separation of law and literature became possible with a new conception of language as the representation of desire: law was reconceived as an instrumental discourse, in which language functioned as a means to realize desire; literature was bounded off as intrinsically worthy discourse, the production of language for consumption. Yet the experience literature offered for consumption was an aesthetic contemplation of desire, or its sublimation. As law was conceived in positivist terms, literature was conceived in Romantic terms. Law and literature were each understood as representations of desire, but they represented desire by means of different tropes, the tropes of realization and sublimation respectively.[592]

Desire 'is positively attracted by something other not yet possessed or needed, is worked out in very original ways and grounded on a rich array of phenomenological evidence.'[593] The Other is absolutely other; the self's relation to the other does not necessarily effectuate dependence. The other 'can *absolve* himself[594] from this relation with his integrity intact.'[595] Levinas calls the relation in

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[590] ibid 16 [Introduction by John Wild]; ibid 34 ['The metaphysical desire […] is a desire that can not be satisfied. For we speak lightly of desires satisfied, or of sexual needs, or even of moral and religious needs. Love itself is thus taken to be the satisfaction of a sublime hunger. If this language is possible it is because most of our desires and love too are not pure.']
[591] ibid 16 [Introduction by John Wild]
[592] Binder & Weisberg, *Literary Criticism of Law* (2000) 109 f.
[593] Levinas, *Totality and Infinity,* 19 [Introduction by John Wild]
[594] Gender alert!
[595] Levinas (n 593) 16 [Introduction by John Wild]

that sense absolving or absolute.[596] 'My way of existing is my final answer.'[597] The association of the other with the Other is not an abstract relation. It manifests in the face-to-face encounter, 'a final and irreducible relation which no concept could cover without the thinker who thinks that concept finding himself forthwith before a new interlocutor […].'[598]

> The absolutely other is the Other. He and I do not form a number. The collectivity in which I say 'you' or 'we' is not a plural of the 'I.' I, you – these are not individuals of a common concept. Neither possession nor the unity of number nor the unity of concepts link me to the Stranger [l' Etranger], the Stranger who disturbs the being at home with oneself [le chez soi]. But Stranger also means the free one. Over him I have no *power*. He escapes my grasp by an essential dimension, even if I have him at my disposal. He is not wholly in my site. But I, who have no concept in common with the Stranger, am, like him, without genus. We are the same and the other.[599]

Pluralism presupposes absolute otherness. The absolutely other can never be subsumed under the totalities established on a mediating concept. Legal actors should be cautious not to destroy the distance between the self and the other in employing the 'human being' and 'human dignity' as mediating concepts. The self and the other are 'without genus'. While recognizing the validity of biological sameness among human beings[600], Levinas insists on the conception of human community as a relation 'instituted by language', which does not rest on 'the unity of a genus.'[601] Fraternity and solidarity[602] among human beings is not premised on their resemblance or on 'a

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[596] ibid; ibid 17 [Introduction by John Wild] ['And [Levinas] finds many other relations of this kind, for example, that of truth. In so far as I am related to another entity and share in its being, it must be really changed. But as classical metaphysics pointed out, in so far as I discover the truth about something, it is absolved from this relation and remains unchanged. The same is true of the idea of absolute perfection which is clearly radically other than what I am. But I can strive for such an other without changing it, or losing my own integrity, just as I can respond to another person and engage in dialogue without jeopardizing his or my own being. Levinas suggests that this may be the reason for Plato's well-known statement at *Republic* 509 that the good lies beyond being, and relates it to his own view that the conclusions of our basic philosophical questions are to be found beyond metaphysics in ethics.']

[597] ibid 17 [Introduction by John Wild]

[598] ibid 290

[599] ibid 39

[600] ibid 213 ['There does indeed exist a human race as a biological genus, and the common function men may exercise in the world as a totality permits the applying to them of a common concept.']

[601] ibid 213f.

[602] Hufen (2004) 313, 317 ['Als anthropologisches Leitbild der Verfassung gilt vielmehr, was das *BVerfGE* schon früh mit dem Stichwort "Menschenbild des Grundgesetzes" als *ein eigenverantwortliches, aber auch sozial gebundenes Individuum* umschrieben hat. Solidarität und Mitmenschlichkeit sind also durchaus Inhalte der Menschenwürde. Deren Unantastbarkeit schließt

common cause of which they would be the effect.'[603] Mysterious participation[604] in such causality connotes the imposition of totalities on human beings. Levinas' skepticism towards 'mysterious participation' in a common causality as the basis of fraternity and solidarity can be viewed as resistance to the association of the transcendental meaning of human dignity with an epiphany originating in natural law doctrine, which is also pinpointed in German legal scholarship as a danger lurking in metaphysical interpretations.[605] What does the conjunction 'and', connecting the 'same' and the 'other', mean? Levinas argues, neither addition, nor authority of one term over the other; rather, it indicates their relation, namely language.[606]

> The relation between the same and the other, metaphysics, is primordially enacted as conversation, where the same, gathered up in its ipseity as an 'I', as a particular existent unique and autochthonous, leaves itself.[607]

The I 'in its ipseity', the self, signifies having 'identity as one's content'[608] and 'existing [as] […] identifying [oneself] [as] […] recovering [one's] […] identity'[609] throughout all that one endures. The I is asserted in the process of ongoing identification of oneself, rather than in the event of static sameness (graph 6):

Konflikte und notwendige Abwägung der "Würde des Einen gegen die Würde des Anderen" nicht vornherein aus.']

[603] Levinas (n 593)

[604] Levinas (n 593); The mysterious quality of the law of human dignity is intimated by Stöcker (1968) 685, 685 ['Kein Wunder also, daß so view Gewicht in einem einzigen Satz von sechs Wörtern dem Interpreten ein ehrfürchtiges Staunen entlockt, das ihn veranlassen wird, sich dem Erhabenen nur in angepaßter Form zu nähern: mit jener zeremoniösen Feierlichkeit nähmlich, in welche die deutsche Zunge gern verfällt, wird sie unvermittelt dem Mysterium konfrontiert.']; ibid 685 fn 3 [Another line of aesthetically termed criticism as regards the phraseology associated with the mysterious quality of human dignity is found in Stöcker, who ponders over whether the category of kitsch would serve the function of fertile critique in legal philosophy and legal science.]

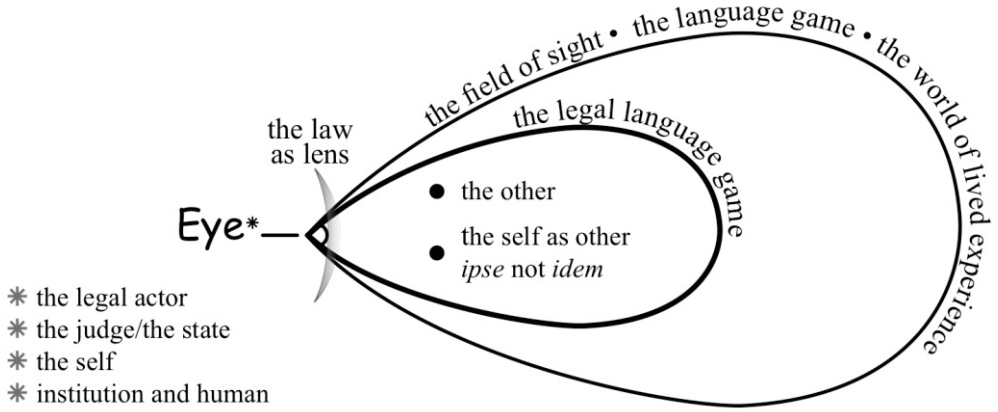
[605] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 19

[606] Levinas (593) 39 ['For language accomplishes a relation such that […] the other, despite the relationship with the same, remains transcendent to the same.']

[607] ibid

[608] ibid 36

[609] ibid



The identity of the individual does not imply being like to oneself and being identified as such from a finger pointing to the self '*from the outside*'.[610] The identification of the self as same eventuates from within.[611] Even when the self appears other to the self, the I remains identical in a self-reflective sense, in other words through absorbing these alterations.

> The I that thinks hearkens to itself thinking or takes fright before its depths and is to itself an other. It thus discovers the famous naïvité of its thought, which thinks 'straight on' as one 'follows one's nose.' It hearkens to itself thinking and surprises itself being dogmatic, foreign to itself. But faced with this alterity the I is the same, merges with itself, is incapable of apostasy with regard to this surprising 'self'. […] The alterity of the I that takes itself for another may strike the imagination of the poet precisely because it is but the play of the same: the negation of the I by the self is precisely one of the modes of identification of the I.[612]

Real conversation between the self and the other can never be foreseeable or exhaustively planned. The 'room for reinterpretation'[613] and the 'spontaneity'[614] on the side of both the self and the other propel uncertainty, indeterminacy, unforeseeability, ambiguity and controversy re the evolution and outcome of the conversation.[615] Levinas associates this 'intersubjective space' with the infinite, with the exteriority of the Other (graph 7):

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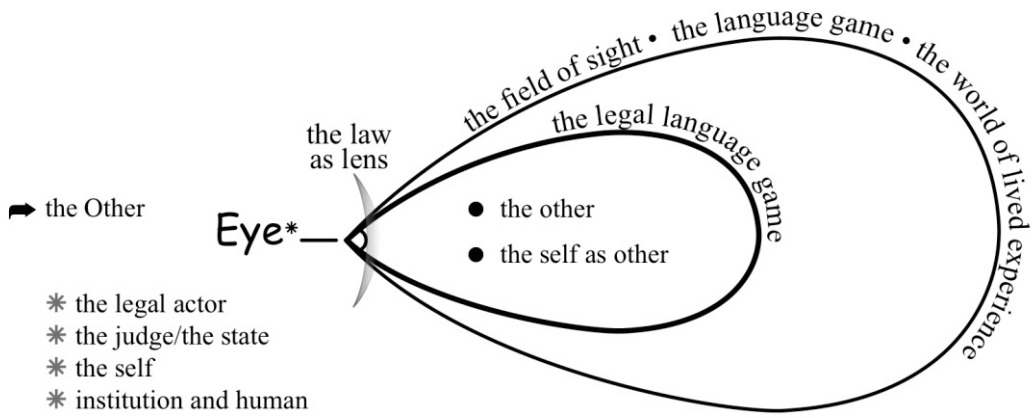
[610] ibid 289
[611] ibid 289; ibid 245 ['The morality called inward and subjective exercises a function which universal and objective law cannot exercise, but which it calls for. […] The judgment of God that judges me at the same time confirms me. But it confirms me precisely in my interiority, whose justice is more severe than the judgment of history.']
[612] ibid 37
[613] ibid 13 [Introduction by John Wild]
[614] ibid
[615] ibid 13 [Introduction by John Wild]



The introduction of the Other into the conversation between the self and the other unveils the dimension of height, which is critical to conceiving how respect towards the dignity of human beings is guaranteed and why the Preamble to the Basic Law pairs responsibility towards human beings with responsibility before God. This 'curvature of intersubjective space'[616] becomes the overloaded *locus* where 'perhaps'[617] God as 'something always missing'[618] is sensed as a presence.

> This curvature of the intersubjective space inflects distance into elevation; it does not falsify being, but makes its truth first possible. […] This 'curvature of space' expresses the relation between human beings. That the Other is placed higher than me would be a pure and simple error if the welcome I make him consisted in 'perceiving' a nature. Sociology, psychology, physiology are thus deaf to exteriority. Man as Other comes to us from the outside, a separated – or holy – face. His exteriority, that is, his appeal to me, is his truth. My response is not added as an accident to a 'nucleus' of his objectivity, but first *produces* his truth (which his 'point of view' upon me can not nullify). This surplus of truth over being and over its idea, which we suggest by the metaphor of the 'curvature of intersubjective space,' signifies the divine intention of all truth. This 'curvature of space' is, perhaps, the very presence of God.[619]

In real conversation, self-determinacy and autonomy are preserved not dogmatically but rather critically, in a coexistence grounded in language, since real conversation with someone genuinely other essentially triggers and feeds on critical

[616] ibid 290; Cf. Gadamer, *Truth and Method* (1975, 2004) 390 ['[…] one intends to *understand the text itself*. […] the interpreter's own horizon is decisive, […] more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says. I have described this […] as a 'fusion of horizons'. We can now see that this is what takes place in conversation, in which something is expressed that is not only mine or my author's, but common.']
[617] Levinas, ibid
[618] ibid
[619] ibid

reflection.[620] This relation is conceived as conversation in radical separation. The distance between the self and the Other enables transcendence, namely the movement that effectuates a crack in totality. Transcendence, at once transascendence[621], implies that the distance between the self and the other is measured in height[622] and depth, vertically; it is the distance 'of conversation, of goodness, of Desire'[623], which is 'irreducible to the distance the synthetic activity of the understanding establishes between the diverse terms, other with respect to one another, that lend themselves to its synoptic operation.'[624] This insight into the dimension of height enhances the distinction and relation between 'something missing' interpreted by analogy with a *Leerstelle* that can be filled in by means of synthetic activity, and 'something always missing' as the meta-dimension of human dignity language practiced in law.

Language preserves the immediacy of the face-to-face, namely the unmediated encounter of '*existents*'[625]. Contrary to the ontological inference that 'the *existent* is disclosed only in the openness of Being' [626], which means that 'we are never directly with the existent as such […]'[627], the infinity of language in the phenomenology of Levinas is premised on non-mediation.

> The immediate is the interpellation and, if we may speak thus, the imperative of language. […] Contact is already a thematization and a reference to a horizon. The immediate is the face to face.[628]

The crack in law's totality eventuates through ongoing struggle against and critical reflection upon the 'neutralization of the other', rendering him or her 'theme or object' that is disclosed and reduced to the same.[629] In light of the introduced

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[620] ibid 13 [Introduction by John Wild] ['My autonomy remains intact. In fact, in so far as I have any, it is stimulated to further intensity by searching questions from a point of view that is not merely opposite and therefore correlative to mine, but genuinely other. I can always say what I wish and even begin once again *de novo*. The same is true of the other. He does not merely present me with lifeless signs into which I am free to read meanings of my own. His expressions bear *his* meanings, and he is himself present to bring them out and defend them.']
[621] ibid 35; ibid 41
[622] ibid 35 ['That this height is no longer the heavens but the Invisible is the very elevation of height and its nobility.']
[623] ibid 39
[624] ibid
[625] ibid 52
[626] ibid
[627] ibid
[628] ibid
[629] ibid 43-44 ['To know ontologically is to surprise in the existent confronted that by which it is not this existent, this stranger, that by which it is somehow betrayed, surrenders, is given in the horizon in which it loses itself and appears, lays itself open to grasp, becomes a concept. To know amounts to grasping being out of nothing or reducing it to nothing, removing from it its alterity. This result is

model, the objectification of the other translates into his or her subsumption under a hermetically and rigidly closed totality, that is, a legal language game that does not comprise any words that could breach it[630]; a doctrine that comprehends all conceivable variations of violation; a theory operating on the basis of dogmatism. Not permitting the self's alienation by the other is symptomatic of dogmatism[631]. Levinas opposes dogmatism[632], arguing for an understanding of theory as 'respect for exteriority'[633] concerned with critique that causes ruptures of history and reacts to the ignorance of the absolutely Other as the transcendent other, usually paired with integration within the impersonal.

> […] we propose to describe, within the unfolding of terrestrial existence, of economic existence […], a relationship with the other that does not result in a divine or human totality, that is not a totalization of history but the idea of infinity. Such a relationship is metaphysics itself. History would not be the privileged plane where Being disengaged from the particularism of points of view (within which reflection would still be affected) is manifested. If it claims to integrate myself and the other within an impersonal spirit this alleged integration is cruelty and injustice, that is, ignores the Other. History as a relationship between men ignores a position of the I before the other in which the other remains transcendent with respect to me. Though of myself I am not exterior to history, I do find in the Other a point that is absolute with regard to history – not by amalgamating with the Other, but in speaking with him. History is worked over by the ruptures of history, in which a judgment is

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obtained from the moment of the first ray of light. To illuminate is to remove from being its resistance, because light opens a horizon and empties space – delivers being out of nothingness.']

[630] MacKinnon, *Are Women Human?* (2006) 46 ['[…] those who occupy what is called the objective standpoint socially, who also engage in the practice from that standpoint called objectification – the practice of making people into things to make them knowable – their standpoint and this practice are an expression of the social position of dominance that is occupied by men.']

[631] While within *Totality and Infinity* the totalizing implications of theory make sense, and lived experience is not silenced or neglected, in certain strands of literature, particularly those with a sociological pedigree, thus seeking particulars and calling for concreteness, such as feminism, the precise meaning of references to totality in postmodern scholarship is challenged. See Mary Joe Frug, 'A Postmodern Feminist Legal Manifesto (An Unfinished Draft)' (1991-1992) 105 *Harvard Law Review* 1045, 1046 ['I am in favor of localized disruptions. I am against totalizing theory.']; Cf. MacKinnon, *Are Women Human?* (2006) 50 ['As to "totality" – a bloated, overfed, but also oddly empty term – what is one against when one is "against totalizing theory"? Why doesn't anyone say what is meant by the term? Why aren't there footnotes to the charge?' Of course, her criticism of unattended to assertions is at once a defense of feminism; 'It is apparently a synonym for "universal," but, just to begin with, no analysis that is predicated on a gender division can be a universal one in the usual sense.']

[632] Levinas, *Totality and Infinity,* 43 [This kind of theory '[…] discovers the dogmatism and naïve arbitrariness of its spontaneity, and calls into question the freedom of the exercise of ontology; it then seeks to exercise this freedom in such a way as to turn back at every moment to the origin of the arbitrary dogmatism of its free existence. This would lead to an infinite regression if this return itself remained an ontological movement, an exercise of freedom, a theory.']

[633] ibid

> borne upon it. When man truly approaches the Other he is uprooted from history. [634]

Critique, unlike theory and ontology, 'does not reduce the other to the same'[635] through the employment of a mediating third term[636]. Levinas does not utterly oppose mediation. Mediation can be meaningful, still, he argues, 'only if it is not limited to reducing distances.'[637] Critique amounts to challenging and reflecting on the exercise of the same.[638] Levinas draws an analogy from the nexus of critique and dogmatism, and thereby establishes the famous thesis on pre-ethics, that is, metaphysics precedes ontology.

> A calling into question of the same – which cannot occur within the egoist spontaneity of the same – is brought about by the other. We name this calling into question of my spontaneity by the presence of the Other ethics. The strangeness of the Other, his irreducibility to the I, to my thoughts and my possessions, is precisely accomplished as a calling into question of my spontaneity, as ethics. Metaphysics, transcendence, the welcoming of the other by the same, of the Other by me, is concretely produced as the calling into question of the same by the other, that is, as the ethics that accomplishes the critical essence of knowledge. And as critique precedes dogmatism, metaphysics precedes ontology.[639]

The relation between the self and the other is irreversible, because the self transcends the distance between the two entities of the face-to-face encounter.

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[634] ibid 52

[635] ibid 43

[636] ibid 43-45 [Levinas notes, 'Western philosophy has most often been an ontology: a reduction of the other to the same by interposition of a middle and neutral term that ensures the comprehension of being.' In the rest of Part 4, titled '*Metaphysics Precedes Ontology*', Levinas confronts the characteristic mediation employed to reduce the distance between the self and the other in Western philosophy. 'The ideal of the Socratic truth' leads Levinas to the conclusion that this strand of philosophy 'is an egology'. Husserl's phenomenology, grounded on 'the promotion of the idea of *horizon*, which for it plays a role equivalent to that of the *concept* in classical idealism', results in the loss of the face; '[a]pproached from Being, from the luminous horizon where it has a silhouette, but has lost its face, an existent is the very appeal that is addressed to comprehension.' Heidegger's *Being and Time* establishes yet another impersonal mediating term, namely Being. 'To affirm the priority of *Being* over *existents* is to already decide the essence of philosophy; it is to subordinate the relation with *someone,* who is an existent, (the ethical relation) to a relation with the *Being of existents*, which, impersonal, permits the apprehension, the domination of existents (a relationship of knowing), subordinates justice to freedom.']; See also the intimation of the pattern of mediation in Wittgenstein, *Tractatus,* (6.2323) ['The equation characterizes only the standpoint [*den Standpunkt*] from which I consider the two expressions [*von welchem ich die beide Ausdrücke betrachte*], that is to say the standpoint of their equality of meaning.']

[637] Levinas (n 632) 44

[638] ibid 43

[639] ibid; ibid 48 ['The 'saying to the Other' – this relationship with the Other as an interlocutor, this relation with an *existent* – precedes all ontology; it is the ultimate relation in Being. Ontology presupposes metaphysics.']; ibid 304 ['The ethical, beyond vision and certitude, delineates the structure of exteriority as such. Morality is not a branch of philosophy, but first philosophy.']

'Alterity is possible only starting from *me.*'[640] The original experience of the other human being is absolute separation from the other, who is no *alter ego* of the self in the face-to-face encounter[641] but rather strange, and, to a certain extent, concealed[642], though 'present in the flesh', distanced, casting a 'questioning glance' towards the self.[643]

The self's primary experience is 'definitely biased and egocentric'[644]. Levinas discerns this 'primordial experience of enjoyment (*jouissance*)'[645] in individuals and groups as the egocentric attitude to interpret other individuals 'either as extensions of the self, or as alien objects to be manipulated for the advantage of the individual or social self.'[646] Conversation cannot 'renounce the egoism'[647] of the self's existence, but grants the Other 'a *right* over this egoism'[648] that justifies[649], for present purposes, the production of law's meaning by the self as actor and interlocutor. Critical reflection constitutes the process of practicing responsibility or, according to Levinas, of responding to the other. Circularly, by responding to the other the self becomes aware of 'arbitrary views and attitudes'[650] springing from 'uncriticized freedom'[651]

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[640] ibid 40

[641] ibid 13 [Introduction by John Wild] ['The other person as he comes before me in a face to face encounter is not an *alter ego*, another self with different properties and accidents but in all essential respects like me. This may be an expression of an optimistic hope from a self-centered point of view which is often verified. The other may, indeed, turn out to be, on the surface at least, merely an analogue of myself. But not necessarily! I may find him to be inhabiting a world that is basically other than mine and to be essentially different from me.']

[642] The theme of concealment in the ontological account under Part A and the linguistic-analytical account under Part B is now further explicated. Concealment is seen here as a manifestation of the other's strangeness – this amounts to a relational and phenomenological account of concealment. Cf. Wittgenstein, *Tractatus*, (3.262) ['[…] What the signs conceal, their application declares.']

[643] Levinas (n 632) 13 [Introduction by John Wild]

[644] ibid 12 [Introduction by John Wild] ['I take precedence over the various objects I found around me, and in so far as my experience is normal, I learn to manipulate and control them to my advantage, either as a member of a group with which I identify with myself or simply as myself alone. In general, these objects are at my disposal, and I am free to play with them, live on them, and to enjoy them at my pleasure.']

[645] ibid

[646] ibid

[647] ibid 40; See also Bourdieu, *Outline of a Theory of Practice* (1977) 40 [egoism of 'private, particular interests' metamorphose into 'disinterested, collective, publicly avowable, legitimate interests.']; Binder & Weisberg, *Literary Criticism of Law* (2000) 476 ['Official authority […] marks a formal boundary within a culture, a sphere of power relatively autonomous from other spheres. Because there exist such relatively autonomous spheres, governed by mechanisms capable of imposing their necessity on agents, those who are in a position to command these mechanisms are able to dispense with strategies aimed expressly and directly at domination. Strategies like law, aimed at formally regulating a field of practice, 'transmute "egoistic" […] interests […] into disinterested […] interests.' [citing Bourdieu]]

[648] Levinas (n 632) 40

[649] ibid

[650] ibid 15 [Introduction by John Wild]

[651] ibid

and cultivates responsibility, namely becomes able to respond in a justifiable manner to the other. [652]

> The questioning glance of the other is seeking for a meaningful response. […] if communication and community is to be achieved, a real response, a responsible answer must be given. That means that I must be ready to put my world into words, and to offer it to the other.[653]

The scope of the responsibility of legal actors, for instance judges authoring judicial decisions, comprises the exercise of critical reflection – also, self-reflection. Responsibility as the ability to respond to the other translates into the responsibility to acquire the competence to perform reflection and to soundly justify decisions grounded on the outcome of such critical process. Language as practice and as justice[654] means 'less interest in conceptual constructions and a greater readiness to listen and learn from experience.'[655]

> […] prior to these systems, which are required to meet many needs, and presupposed by them is the existing individual and his ethical choice to welcome the stranger and to share his world by speaking to him. In other words, we do not become social by first being systematic. We become systematic and orderly in our thinking by first freely making a choice for generosity and communication, i.e., for the social. […] according to Levinas, speaking becomes serious only when we pay attention to the other and take account of him and the strange world he inhabits.[656]

Responsibility is premised on generosity, articulating one's world and 'offering it to the other'[657], because '[t]here can be no free interchange without something to give.' Generosity does not cause the disappearance of the distance separating the self from the other, nor does it bring them together.

> Metaphysics, or the relation with the other, is accomplished as service and as hospitality.[658]

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[652] ibid ['It is only then that I see the need of justifying my egocentric attitudes, and of doing justice to the other in my thought and in my action.']
[653] ibid 14 [Introduction by John Wild]; In interpreting the trail of thought [*Gedankengang*] of Heraclitus in its entirety, Thurner distinguishes between the self, language and thought; language corresponds to 'the means to responding' [*Weg zur Beantwortung*]. As noted *supra,* the demarcating line between the ontological and the phenomenological in the thought of the philosophers resorted to presently cannot always be clearly drawn. Common threads among the philosophically grounded accounts are illustrative of their mutual relevance. In Thurner (2001) 185
[654] Levinas (n 632) 213
[655] ibid 16 [Introduction by John Wild] ['The basic difference is between a mode of thought which tries to gather all things around the mind, or self, of the thinker, and an externally oriented mode which attempts to penetrate into what is radically other than the mind that is thinking it.']
[656] ibid 14-15 [Introduction by John Wild]
[657] ibid 14 [Introduction by John Wild]
[658] ibid 300; See Derrida, *Adieu to Emmanuel Levinas* (1999)

> To posit being as Desire and as goodness is not to first isolate an I which would then tend toward a beyond. […] it is to affirm that the becoming-conscious is already language, that the essence of language is goodness, or again, that the essence of language is friendship and hospitality. The other is not the negation of the same, as Hegel would like to say. The fundamental fact of the ontological scission into same and other is a non-allergic relation of the same with the other. [659]

'Something always missing' in the story presently told corresponds to the 'invisible'[660] in Levinas' thought, which informs and elevates the meaning of responsibility[661]. The absolute distance between the self and the other is premised on asymmetry[662] or non-reversibility. Reversibility would result in the overlapping of the self with the other, and would form a totality comprising both, and 'visible from the outside.'[663]

> The intended transcendence would be thus reabsorbed into the unity of the system, destroying the radical alterity of the other. […] the radical separation between the same and the other means precisely that it is impossible to place oneself outside of the correlation between the same and the other so as to record the correspondence or the non-correspondence of this going with this return. Otherwise the same and the other would be reunited under one gaze, and the absolute distance that separates them filled in. [664]

Approaching 'something missing' as a *Leerstelle* through insights ensuing from *Totality and Infinity* conforms more to the task of a totalizer. The proposition that 'expression precedes'[665] the 'coordinating effects'[666] of seeking to comprehend the meaning of 'something missing' by means of broadening our horizons and scrutinizing context should not be understood as a polemic stance towards totality; rather, the primacy of expression signals the precedence of the ethical.

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[659] Levinas (n 632) 305
[660] ibid
[661] ibid 35 ['Demented pretension to the invisible, when the acute experience of the human in the twentieth century teaches that the thoughts of men are borne by needs which explain society and history, that hunger and fear can prevail over every human resistance and every freedom! There is no question doubting this human misery, this dominion of the things and the wicked exercise over man, this animality. But to be a man is to know that this is so. Freedom consists in knowing that freedom is in peril. But to know or to be conscious is to have time to avoid and forestall the instant of inhumanity. It is this perpetual postponing of the hour of treason – infinitesimal difference between man and non-man – that implies the disinterestedness of goodness, the desire of the absolutely other or nobility, the dimension of metaphysics.']
[662] ibid 244 ['God sees the invisible and sees without being seen.']
[663] ibid 35-36
[664] ibid
[665] ibid 201
[666] ibid

> Expression is not produced as the manifestation of an intelligible form that would connect terms to one another so as to establish, across distance, the assemblage of parts in a totality, in which the terms joined up already derive their meaning from the situation created by their community, which, in its turn, owes its meaning to the terms combined. This 'circle of understanding' is not the primordial event of the logic of being. Expression precedes these coordinating effects visible to a third party. [667]

The conversation between the self and the other enriches law's *Menschenbild* in the spirit of the law of human dignity and initiates an elaborate relational account of human being-ness. 'Something is missing' because the absolutely other is strange. Figuratively rendered particular characteristics are not identified. The expression of the face, in all its diversity and uniqueness, manifests the human-beingness of the other as a particular existent, not an abstract Being.[668]

> Being is exteriority: the very existence of its being consists in exteriority, and no thought could better obey being than by allowing itself to be dominated by this exteriority. […] The face to face is established starting with a point separated from exteriority so radically that it maintains itself of itself, is me; every other relation that would not part from this separated and therefore arbitrary point […], would miss the – necessarily subjective field of truth. The true essence of man is presented in his face […].[669]

The *Menschenbild* is an icon, an '*image* of being'[670], the 'the *idea* of its nature'[671] and not its truth.[672] Rather, explains Levinas, the 'truth of being[673] […] is the being situated in a subjective field which *deforms* vision, but precisely thus allows exteriority to state itself, entirely command and authority: entirely superiority.'[674]

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[667] ibid; In line with Levinas' assertion that neither the yes nor the no are the first word in language, and that the primordial event of the logic of being is not found in the 'circle of understanding', that is, through a reflexive process, see Gadamer, *Truth and Method* (1975, 2004) 425 [on incarnation and how it implies that the inner mental word is not deduced from a reflective act]; See also Palmer (1969) 204 ['To see language and words as the tools of human reflection and subjectivity is to allow the tail to wag the dog. […] In the case of language, its saying power, not its form, is the central and decisive fact. […] The unity of language and thought itself, the nonreflexivity of the formation of words, both refute the idea of language as sign. Language is an encompassing phenomenon, like understanding itself. It can never be grasped as "fact" or fully objectified; like understanding language encompasses everything that *can* become object for us. The early Greeks, Gadamer notes, had no word or concept for language itself; like being and understanding, language is medium, not tool.']

[668] Levinas (n 632) 213 ['Like a shunt every social relation leads back to the presentation of the other to the same without the intermediary of any image or sign, solely by the expression of the face. When taken to be like a genus that unites like individuals the essence of society is lost sight of.']

[669] ibid 290

[670] ibid

[671] ibid

[672] ibid

[673] ibid

[674] ibid

Within the realm of fundamental rights, human dignity is not practiced in isolation; rather, it constitutes just one of the three core fundamental rights concepts, the other two being liberty and equality. Levinas considers freedom 'an abstraction that reveals itself to be self-contradictory when one supposes it to have a limitation'[675], namely to be finite, and thus not apt to portray the relation of beings in war, namely a relation that presupposes yet 'does not constitute a totality.'[676] Due to its arbitrariness, freedom always needs to be tempered with justice[677].

> The irrational in freedom is not due to its limits, but to the infinity of its arbitrariness. Freedom must justify itself; reduced to itself it is accomplished not in sovereignty but in arbitrariness. […] Freedom is not justified by freedom. To account for being or to be in truth is not to comprehend nor to take hold of …, but rather to encounter the Other without allergy, that is, in justice. [678]

The freedom of the I is subordinated[679] 'in welcoming the Other'[680]. In *Totality and Infinity* equality is founded on the 'welcoming of the face'[681] towards whom one is already responsible. This face 'approaches me from a dimension of height and dominates me.'[682]

> Equality is produced where the other commands the same and reveals himself to the same in responsibility; otherwise it is but an

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[675] ibid 223
[676] ibid 224
[677] See Otto (2005) 473, 474ff. [distinction between *Unrecht* (illegality), which refers to the violation of legal obligations, and *Ungerechtigkeit* (injustice), which constitutes a principle and standard by which legal norms can be measured]; ibid 478f. [Exploring the link between human dignity and justice, Otto explicitly frames a relational account of human dignity apropos the other [*der Andere*]. The idea of community within society and essentially also the notion of equality are indispensable aspects of the meaning of justice in light of human dignity. Otto notes: 'Die ungleiche Behandlung Einzelner in Normen und Entscheidungen kann daher ein Unrecht sein, ungerecht muss sie nicht sein. Erst dann, wenn der Rechtsstatus des in der Würde Gleichen betroffen ist, wird eine Norm oder eine Entscheidung ungerecht. Differenzierungen des Einzelnen aufgrund seines Soseins als Mensch, Beschränkungen seiner Autonomie und der Möglichkeit der Gestaltung seiner Lebensverhältnisse in dem Maße, dass kein eigener wesentlicher Gestaltungsfreiraum verbleibt, und die Nutzung des Menschen als Objekt der Wohlfahrt der Anderen kennzeichnen ungerechte soziale Verhältnisse, weil sie die der Menschenwürde angemessene Achtung verletzen.']
[678] Levinas, *Totality and Infinity*, 303
[679] ibid 300 ['In welcoming the Other I welcome the On High to which my freedom is subordinated. But this subordination is not an absence: it is brought about in all the personal work of my moral initiative (without which the truth of judgment cannot be produced), in the attention to the Other as unicity and face (which the visibleness of the political leaves invisible), which can be produced in the work of truth, and not as an egoism refusing the system which offends it.']
[680] ibid
[681] ibid 214
[682] ibid

> abstract idea and a word. It cannot be detached from the welcoming of the face, of which it is a moment.[683]

Are there traces of human dignity meaning in *Totality and Infinity*? The analogies between the notion of morality in the phenomenology of Levinas and the law of human dignity are plain to see. Insights into morality, in particular vis-à-vis freedom and equality, elucidate the meaning of practicing human dignity language in law.

> The accomplishing of the I qua I and morality constitute one sole and same process in being: morality comes to birth not in equality, but in the fact that infinite exigencies, that of serving the poor, the stranger, the widow, and the orphan, converge at one point of the universe. Thus through morality alone are I and the others produced in the universe. [684]

The concept of morality as in *Totality and Infinity* affords the introduced model an account of the transcendental, pre-ethics, in practicing the law of human dignity and a response to the question how that law appears empty. 'The poor, the stranger, the widow, and the orphan' signify – bearing in mind the historical social context of Levinas and *Totality and Infinity* – the vulnerable or less fortunate, those deprived of something, those lacking means, *locus* or protectors. The famous thesis 'metaphysics precedes ontology', which translates also into 'ethics precedes ontology', grounds the meaning of fraternity and solidarity as aspects of human dignity meaning on solid footing.

> The human I is posited in fraternity: that all men are brothers is not added to man as a moral conquest, but constitutes his ipseity. Because my position as an I is *effectuated* already in fraternity the face can present itself to me as a face.[685]

Another, more comprehensive approach to 'the very status of the human' draws connections between fraternity, the idea of the human race, individuality, biological resemblance, integrity in the sense of being self-referential, and responsibility, while hinting at infinity, that is, the meta-dimension of human dignity meaning.

> The very status of the human implies fraternity and the idea of the human race. Fraternity is radically opposed to the conception of a

[683] ibid
[684] ibid 245
[685] ibid 280

> humanity united by resemblance […]. Human fraternity has then two aspects: it involves individualities whose logical status is not reducible to the status of ultimate differences in a genus, for their singularity consists in each referring to itself. (An individual having a common genus with another individual would not be removed enough from it.) On the other hand, […] Monotheism signifies this human kinship, this idea of a human race that refers back to the approach of the Other in the face, in a dimension of height, in responsibility for oneself and for the Other.[686]

Apropos the juxtaposition of totality and infinity and the – indeed sophisticatedly refined – account of metaphysics in Levinas' phenomenology, the meaning of human dignity as the respect accorded to every human being by virtue of being human is related to transcendence as transascendance and to the transcendent human being. Attuned to the inviolable position of the limit in light of linguistic-analytical insights from the *Tractatus Logico-Philosophicus*, the transcendent being in the phenomenology of Levinas escapes any ontologically termed grasp, receives no content or form, no '*what is*', but rather commands respect for the limit as such, to wit the human being *qua* being.

> Knowledge[687] would be the suppression of the other by the grasp, by the hold, or by the vision that grasps before the grasp. In this work metaphysics has an entirely different meaning. If its movement leads to the transcendent as such, transcendence means not appropriation of *what is*, but its respect. [688]

The neutral and the impersonal imperil law's humanism. The active and the personal emphasize the face of the human being. Tracing the active and personal in law as part of life, while appreciating the value of the neutral and impersonal for attaining justice through law, focuses on the meaning produced by actors as authors. The portrayal of how actors practice the dual sense of 'something missing' as an aspect of practicing human dignity language in law sets the stage for critical reflection and further theoretical and empirical approaches. Contentions regarding the misuse of the legal concept at the level of actors' *praxis* should be premised on a systematic portrayal of human dignity practice. In his Introduction to *Totality and Infinity*, John Wild notes:

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[686] ibid 214
[687] See also MacKinnon, *Are Women Human?* (2006) 46 ['[…] objectification – the practice of making people into things to make them knowable […].']
[688] Levinas (n 678) 302

> Slavery is the dominance of the neutral and impersonal over the active and personal. In a living dialogue and even in a written monologue of many volumes it is more important to find out who is speaking and why, than merely to know what is said. We do not *need* to know the other person (or thing) as he is in himself, and we shall never know him apart from acting with him. But unless we *desire* this, and go on trying, we shall never escape from the subjectivism of our systems and the objects they bring before us to categorize and manipulate. We do not get rid of our thoughts and feelings by ignoring them or by any other means. But we may seek to transcend them, first as individuals and only later, perhaps, as a group. The individual person becomes free and responsible not by fitting into a system but rather by fighting against it and by acting on his own.[689]

Wild recapitulates spinal themes in the *supra* analysis. This excerpt underlines the importance of safeguarding the possibility of escape by interpreting, understanding and practicing concepts that can effectuate a crack in the totality of systems, ultimately preserving and advancing law's humanism; reinforces the justification of employing the term 'practice'; associates objectification with obstructing escape from systems that allow for grasping, classifying and manipulating what lies within their scope; orients legal actors and the legal order as a whole towards transcendence; and serves as a transition to important epistemological insights, synoptically, to the responsibility to engage in critical reflection on established systems implied by human dignity language.

D. Concluding observations and an epistemological remark

The ontological foundations of 'something missing' as a qualitative aspect of human beings *qua* beings places law's *Menschenbild* and the meta-dimension of the law of human dignity in a new light. 'Something missing' is an ontological inherent quality of human being-ness, and trails the 'human' component of the legal concept on the basis of a linguistic and semantic overlapping. If human dignity is an 'empty' concept, then how is it empty? What is the role of the law of human dignity in an anthropocentric legal order? Human dignity guarantees an *ultimum refugium* for human beings' human being-ness from forced and, *a minore ad maius*, from forceful

[689] ibid 18 [Introduction by John Wild]; ibid 222 ['War therefore is to be distinguished from the logical opposition of the *one* and the *other* by which both are defined within a totality open to a panoramic view, to which they would owe their very opposition. In war beings refuse to belong to a totality, refuse community, refuse law; no frontier stops one being by another, nor defines them. They affirm themselves as transcending the totality, each identifying itself not by its place in the whole, but by its *self*.']

interference – for instance, humiliation – with the irruptive happening of coming into Being. This *refugium* within the realm of law's practice, is at the same time, indeed paradoxically, a *refugium* from law, and from the legal concept of human dignity[690]. Law can transform perspective into being both formally and substantively[691] or, more broadly put, law has power over meaning. Understanding the law of human dignity as a surplus term within the realm of law on account of the 'human' component of 'human dignity' is required for the humane practice of law – even of the law of human dignity *per se*. How human dignity transcends the realm of law while remaining attached to its boundaries is inquired into in the linguistic-analytical and phenomenological accounts.

The void of the limit reflected in the tautological proposition communicating the meaning of human dignity, as the worth of human beings by virtue of being human, is associated, in the linguistic-analytical account, with the transcendental dimension of the law of human dignty. By analogy with the metaphysical subject each human being is located at an inviolable limit. The limit is a genuinely inviolable position; that each human being has a unique viewpoint on the world, thus produces meaning in self-determination at the elemental level of language. The limit constitutes at once the content and the form of the meaning of human dignity. Setting the human being at the limit precludes the very possibility of objectification, namely of subsumption under a totality, for present purposes under the totality of legal language games produced in judicial practice of the law of human dignity.

The phenomenology of Levinas in *Totality and Infinity* spells out pre-ethics. Does he 'say' what can only be 'shown', therefore contravene the foundations of the linguistic-analytical account of the law of human dignity? Or does Levinas utter the preconditions of critical reflection as the process of humane practice of the law of human dignity, that is, of the discarding of the ladder used to ascend to understanding, to transcend? The second interpretation is adopted for present purposes. To those resisting indulging in the richness of phenomenological insights deduced from *Totality and Infinity,* consisting of reflections on the transcendental masterly attached to facets of lived experience, maintaining the ladder metaphor as part of the

[690] Kunig, Art. 1, *GG Kommentar* (2012) para 14 ['[…] es ist denkbar, dass nicht erst die Anwendung eines Gesetzes, sondern bereits das Gesetz selbst einen Verstoß gegen die Menschenwürde darstellt. Das angeführte Zitat darf auch nicht in der Weise verstanden werden, dass Menschenwürde nur in böser Absicht verletzt werden könne. Gerade die 'gute Absicht' ist gefährlich, wenn sie den Menschen als Person mit seiner metaphysischen Dimension aus dem Auge verliert.']
[691] MacKinnon, *Toward a FTS* (1989) 237

introduced model allows for critically reflecting on the pre-ethics put forward borrowing concepts from the thought of Levinas. The pre-ethics of hospitality, generosity, goodness, and desire for the radically other as Other capture and embody prerequisites to the very possibility of pluralistic human community and communication.

Fragment 123 of Heraclitus, 'nature loves to hide itself'[692], as interpreted by Rescher, affords valuable epistemological insights that assist us in perceiving how doctrinal concepts employed recurrently in the practice of the law of human dignity can be understood as tools of thought experimentation and critical reflection. Being a 'devoted practitioner of thought experimentation'[693], Heraclitus employed 'fact-contravening hypotheses'[694] in pursuit of 'far-reaching conclusions'[695] and resorted to 'projecting assumptions about what is not'[696] to better understand 'what is'[697]. This pattern of thought experimentation intimates the reasoning of negative determinations of human dignity meaning in legal doctrine, which, however, deviates from thought experimentation in that 'what is not' is not artificially constructed, but rather an image corresponding to – harsh, in most cases – reality. Thought experimentation is more apt to understanding anew the meaning introduced into legal language games produced through the lens of the law of human dignity through the practice of the language of the *Objektformel* doctrine. Objectification, save in borderline cases such as the *Aviation Security Act,* where the other is – in actuality – objectified by a self, is an artifact, a thought experiment serving to evoke, from a hermeneutic and literary perspective, images of human being-ness.

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[692] Rescher (2005) 60
[693] ibid 59; 60 ['Though their [Presocratics] interest was in reality, their deliberations about it placed extensive reliance on the use of problematic hypotheses in thought experimentation. […] Someone might perhaps be tempted to think that the success which the Greek nature-philosophers had with *thought* experimentation exerted a dampening influence on their development in *real* experimentation. But this would be both unjust and inappropriate. […] the development of thought experimentation is in fact an essential *preliminary* to the development of real experimentation as such.']
[694] ibid 59
[695] ibid
[696] ibid
[697] ibid

CHAPTER TWO

STORIES OF 'SOMETHING MISSING':

THE LAW OF HUMAN DIGNITY IN THE JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT OF GERMANY

In Chapter Two, I employ the model set up in Chapter One for hermeneutically and literary portraying how the dual sense of 'something missing' as an aspect of the meaning of the law of human dignity is practiced. The model is used as a lens through which to look at the text of five Federal Constitutional Court cases, undeniably bracketed seminal instances of human dignity jurisprudence in German and Anglo-American legal scholarship.[698] As background to these five stories of 'something missing', a brief overview of relevant practice of human dignity language in law 'on the books' post 1945 is deemed necessary. At the same time, looking at positive law manifestations through the constructed lens aims at making readers conversant with the application of this hermeneutic and literary tool.

A. Reflections on the law of human dignity 'on the books' post 1945

Human dignity language appears in most all documents composing the International Bill of Human Rights[699], while in EU law, the legal character of the

[698] The length of the analysis and the, at times, unavoidable repetition of excerpts of the text of the five cases are incidental to the enterprise of a hermeneutic and literary approach to text as an aspect of law's practice.

[699] The International Bill of Human Rights comprises the *Universal Declaration of Human Rights* (UDHR) G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) [Preamble, Art. 1, 22, 23]; the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976 [Preamble, Art. 13 sec. 1]; the *International Covenant on Civil and Political Rights* (ICCPR) (1966) [Preamble, Art. 10 sec. 1] G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; the *Optional Protocol to the ICCPR* (1966) G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976; and the *Second Optional Protocol to the ICCPR* (1990) G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991 [declaring the abolition of death penalty]. Human dignity language is explicitly present in all documents but the *Optional Protocol to the ICCPR*. Other international human rights instruments within which human dignity language is found are the *International Convention on the Elimination of All Forms of Racial Discrimination* (1966) 660 U.N.T.S. 195, *entered into force* Jan. 4, 1969; the *Convention on the Elimination of All Forms of*

concept is boldly affirmed in the text of the 2000 *European Union Charter of Fundamental Rights* (EU Charter)[700], which formed part of the Treaty of Lisbon (Reform Treaty) in 2009. Numerous constitutions practice the law of human dignity. A hermeneutic and literary approach, while acknowledging the distinct significance of mobilization in legally binding vis-à-vis non-binding texts, is not anchored to mainstream determinations of 'legal' character[701]; rather, this approach looks at positive law to provide background to the succeeding analysis of judicial practice, to denote comparative relevance, and opportunistically tease out and highlight themes identified *supra* in Chapter One. Ultimately – and in that it deviates from the mainstream – the present, hermeneutic and literary, methodological approach seeks to elucidate the cultural and/as literary dimension of law. [702] While mainstream, positivist approaches might seek to verify or falsify the subsumption of language and meaning under axiomatically defined 'normativity' and 'legal' character, this approach interprets texts to induce another understanding of the presence of human dignity language within, or even despite, the 'legal' shell.

Albeit different, both the mainstream and the present viewpoint contribute to delivering upon the commitment expressed in the legal guarantee of human dignity and to fostering law's humanism. Mainstream, positivist accounts point out the lack of legally binding provisions and enforceability where these would be beneficial to the fulfillment of fundamental rights[703]. The hermeneutic and literary lens on selected

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Discrimination against Women (1979) G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, *entered into force* Sept. 3, 1981; the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment* (1984) G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), *entered into force* June 26, 1987; the *Convention on the Rights of the Child* (1989) G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2, 1990; the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* (1990) G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), *entered into force* July 1, 2003; and the *International Convention on th Protection and Promotion of the Rights of Persons with Disabilities* (2008) G.A. Res. 61/106, Annex I, U.N. GAOR, 61st Sess., Supp. No. 49, at 65, U.N. Doc. A/61/49 (2006)*, entered into force* May 3, 2008

[700] [2000] O.J. C 364/1 [ECFR]

[701] As shown *supra* (Chapter One, ontological account) there is a sense beyond enforceability in which legal actors always practice 'something missing' in employing human dignity language. This analysis concentrates on themes (identified *supra* in Chapter One) that reflect aspects of human dignity practice irrespective of the concept's actual normative status and legal effects. This clarification does not amount to a polemic stance towards mainstream and positivist interpretations of international law human dignity clauses. In fact, this study only adopts a different angle and operates at another, pre-legal and pre-ethical, level, tracing in texts as aspects of the practice of law the meta-dimension of human dignity.

[702] Baer, *Rechtssoziologie* (2011) 17

[703] See, for instance, how Kelsen's positivist account of rights reflects the pursuit of law's humanism. Kelsen, *The Law of the United Nations*, 41-42 ['Besides, the view that all human beings are endowed

instances of the law of human dignity 'on the books' at the international, regional and constitutional level can sensitize about and provoke reflection on whether the practice of that law is humane. To those ends, I draw on sources among the abundance of overviews of human dignity in positive law in German and Anglo-American legal scholarship. Primarily, I seek to assert the value of the methodological approach; secondarily, references to positive law manifestations of human dignity language serve as background to the analysis of FCC jurisprudence *infra*.

Human dignity language is practiced in positive law across levels of constitutionalism[704]: at the international, regional, and constitutional level[705]. The human dignity panegyric has endured remarkably in positive law since 1945.[706] Indeed, 'it is an interesting fact that it was only after the Second World War that the philosophical concept of human dignity, which had already existed in antiquity and acquired its current canonical expression in Kant, found its way into texts of international law and recent national constitutions.'[707]

While bearing in mind the explicitly stated and widely affirmed interpretation of post-1945 practice of human dignity language in positive law as an expression of

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with reason and conscience is, in view of the differences which exist with respect to the degree in which human beings are endowed with reason and conscience, meaningless. The statement that all human beings are born free and equal, is a specific natural-law doctrine, and this doctrine is far from being generally accepted. […] from the point of view of a bill of rights, it is not the question how human beings are born, but the question how human beings shall be treated by the law, regardless of how they actually are born, and regardless of the great differences which actually exist between them. It is not very fortunate that the Declaration of Human Rights starts with a problematic statement and thus places the whole document under the sway of highly disputed doctrine.']

[704] See Pernice (2004)

[705] See Vicki C. Jackson, 'Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse' (2004) 65 *Montana Law Review* 15 [practice of human dignity language in constitutional law at the state level in the US]

[706] Habermas, 'The Concept of Human Dignity' (2010) *Metaphilosophy* 464, 465 f. ['Why does talk of "human rights" feature so much earlier in the law than talk of "human dignity"? Certainly the founding documents of United Nations, which drew an explicit connection between human rights and human dignity, were clearly a response to the mass crimes committed under the Nazi regime and to the massacres of the Second World War. […] Is it only against the historical background of the Holocaust that the idea of *human rights* becomes, as it were, retrospectively morally charged – and possibly overcharged – with the concept of *human dignity*? The recent career of the concept of 'human dignity' in constitutional and international legal discussions tends to support this idea. […] there is a striking temporal dislocation between the history of *human rights* dating back to the seventeenth century and the relatively recent currency of the concept of *human dignity* in codifications of national and international law, and in the administration of justice, over the past half century.']

[707] ibid 465 ['Only during the past few decades has it also played a central role in international jurisdiction. By contrast, the notion of human dignity featured as a legal concept neither in the classical human rights declarations of the eighteenth century nor in the codifications of the nineteenth century […].']

global reaction to the atrocities of World War II[708], another reason why the *post* United Nations Charter (UN Charter) era is emphasized is its role in the gradual coming-into-being of a multilevel constitutionalism reality. Although exploring and comprehensively demonstrating the subtleties of the interplay between levels of constitutionalism with respect to the subject matter exceeds the scope of my research questions, it is important to take cognizance of this reality of underpinning interconnectedness and plant a seed in the consciousness of the reader: to have an eye for similarities and differences re the practice of human dignity language and the meaning it conveys.

Manifestations of human dignity 'on the books' of interest to a hermeneutic and literary enterprise need not necessarily surface as the most attractive examples for mainstream doctrinal accounts. For instance, from a mainstream perspective, preambular references could be swept aside on the basis of their aspirational, political, symbolic[709], or merely rhetorical character; they could, however, be highly relevant to a hermeneutic and literary approach to the law of human dignity. Likewise, although declarations, principles, guidelines, standard rules and recommendations have no binding legal effect[710] unless recognized as customary international law as the Universal Declaration of Human Rights (UDHR), such international human rights instruments offer valuable practical guidance to States Parties as to the rights that yield respect and protection and often develop significant political, moral and rhetorical force.

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[708] An alternative basis is proposed by Hennette-Vauchez, 'A human *dignitas*?' (2011) 32, 56 ['[…] current legal conceptualizations and usages of the principle are seen erroneously as derivations of post-World War II dignity; rather, they descend from the old *dignitas*, essentially status-based more than humanist. Such a distinction is crucial: the human dignity principle is not all about human rights.']; See also Panagiotis Kondylis, 'Art. "Würde" – Abs. II-VIII' in Otto Brunner, Werner Conze & Reinhart Kosselleck (eds), *Geschichtliche Grundbegriffe* (Bd. 7, Stuttgart: Klett-Cotta Verlagsgemeinschaft, 1992) 645, 657 [French Declaration (1789), '*dignités*']

[709] See Herald Kindermann, 'Symbolische Gesetzgebung' (1988) 13 *Jahrbuch für Rechtssoziologie und Rechtstheorie* 222 [distinction between instrumental and symbolic lawmaking]; Thomas Raiser, *Grundlagen der Rechtssoziologie: Das lebende Recht* (5th edn, Stuttgart: Mohr Siebeck, 2009) 243ff. [symbolic impact and validity]; There is law that develops only a symbolic impact. One could consider symbolic law ineffective on the grounds that it does not state the expectation or the regulation of certain conduct, or impose sanctions; See also Erhard Blankenburg, 'Rechtssoziologie und Rechtswirksamkeitsforschung – Warum es so schwierig ist die Wirksamkeit von Gesetzen zu erforschen' in Konstanze Plett & Klaus A. Ziegert, *Empirische Rechtsforschung zwischen Wissenschaft und Politik: zur Problemlage rechtssoziologischer Auftragsforschung* (Max-Planck-Institut für Ausländisches und Internationales Privatrecht, Tübingen: Mohr, 1984) 45; See also Jens Newig, *Symbolische Umweltgesetzgebung: Rechtssoziologische Untersuchungen am Beispiel des Ozongesetzes, des Kreislaufwirtschafts- und Abfallgesetzes sowie der Großfeuerungsanlagenverordnung* (Berlin: Duncker & Humblot, 2003) [impact of symbols on the practice of the law]

[710] Covenants, conventions, protocols and statutes on the other hand are legally binding.

The expansion of human dignity and human rights through symbolic and rhetorical mobilization can be portrayed as a diffusion-spiral, a process of dispersing, spreading and diffusing law and essentially also the language of law.[711] The diffusion-spiral is set in motion through implementation, adaptation and consciousness-raising[712], pursued by means of argumentation, dialogue and persuasion, that is, rhetorical processes.[713] The introduction of human dignity and rights language into law 'on the books' marks their internalization as part of the legal order and their institutionalization.[714] A boomerang effect of this spiral process cannot be foreclosed; critique, resistance, or opposition to the new language and law can cause such initiatives to return to 'the thrower'. The rhetorical mobilization of law is indispensable to political action and to the traversal of limits separating the realms of social reality[715] and law; still it does not amount to actual enforcement. The symbolic and rhetorical impact asserted by voices in the literature calls for empirical verification.[716]

The absence of human dignity language in the European Convention on Human Rights of the Council of Europe[717] may be understood simply as lack of explicit reference, as the Preamble to the Convention expressly embraces the UDHR, underlining the importance of a 'common understanding and observance of the human rights […]'. Omissions of human dignity language in positive law, as in the case of the ECHR or the Canadian constitutional text, are also of interest insofar as the narratives about them in legal scholarship convey portrayals of the self, the other and the world corresponding to the context that generated them.[718] Commenting more

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[711] See Thomas Risse & Kathryn Sikkink, 'The socialization of international human rights norms into domestic practices: introduction' in Thomas Risse-Kappen, Stephen C. Ropp & Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 1 [diffusion]; Baer, *Rechtssoziologie* (2011) 223

[712] Andrew T. Guzman, *How International Law Works – A Rational Choice Theory* (Oxford, New York: Oxford University Press, 2007) 33 [reciprocity, retaliation, reputation as parameters of compliance]; Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009) 102, 117ff. [reputation]; Baer (n 711)

[713] Baer ibid

[714] ibid

[715] ibid 222

[716] ibid 223

[717] November 1950, 213 U.N.T.S. 221, Eur.T.S. 5 [ECHR]

[718] See Baer, 'Triangle' (2009) University of Toronto Law Journal 417, 445 ff. ['If my […] suggestion is correct and constitutions address that which is endangered and do not necessarily make explicit those matters on which there is a consensus 'behind the curtain,' then there is a plausible explanation for this; again, text is not all there is to constitutional law, and a triangle may be lurking in the shadows. In Canada, respect for human beings was so foundational to constitutional law that an explicit formula seemed redundant.']

generally on omissions in the UDHR, MacKinnon notes they 'are not merely semantic.'[719] This observation indicates the complexity of the phenomenon of omissions: they are not merely linguistic, but also semantic; they are not merely semantic, but also real, in the sense that they correspond to 'something missing' at the level of social reality.

> Being a woman is 'not yet a name for a way of being human,' not even in this most visionary of human rights documents. If we measure the reality of women's situation in all its variety against the guarantees of the Universal Declaration, not only do women not have the rights it guarantees – most of the world's men don't either – but it is hard to see, in its vision of humanity, a woman's face.
> Women need full human status in social reality. For this, the Universal Declaration of Human Rights must see the ways women distinctively are deprived of human rights as a deprivation of humanity. […]
> When will women be human? When?[720]

The word 'human' cuts through the argument: 'being human', 'humanity', 'human status', and 'human rights'. This excerpt, besides demonstrating another facet of the phenomenon of omissions in law, affirms, first, that 'human' designates the broadest possible 'surplus name'[721]; second, states that the text of the UDHR under scrutiny in MacKinnon's critique mirrors a vision of humanity; third, notes that the face, 'a woman's face', is the *locus* where humanity is concretized; fourth, demands that the human status of this 'face' be recognized in law and in 'social reality'; and, finally, states that the UDHR 'must see', that is, encounter face-to-face women and how they are deprived of humanity.

In EU law, the legal character of the concept is boldly affirmed in the text of the *European Union Charter of Fundamental Rights* (EU Charter) (2000), which formed part of the Lisbon treaty (2009). Art. 1, on 'human dignity', under Chapter I, titled 'Dignity', reads:

> Human dignity is inviolable. It must be respected and protected.

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[719] MacKinnon, *Are Women Human?* (2006) 42

[720] MacKinnon, *Are Women Human?* (2006) 43; ibid 48 ['By including what violates women under civil and human rights law, the meaning of 'citizen' and 'human' begins to have a woman's face. As women's actual conditions are recognized as inhuman, those conditions are being changed by requiring that they meet a standard of citizenship and humanity that previously did not apply because they were women. In other words, women both change the standard as we come under it and change the reality it governs by having it applied to us.']

[721] As noted in the introductory delineation, animals are not attended to in the presently furthered argument.

Chapter One encompasses, apart from 'human dignity', a series of other guarantees framed as rights, namely the 'right to life' (Art. 2), the 'right to the integrity of the person' (Art. 3)[722], or as prohibitions, the 'prohibition of torture and inhuman or degrading treatment or punishment' (Art. 4), and the 'prohibition of slavery and forced labour' (Art. 5). Solely the coexistence of human dignity language with other rights within this legal language game and the systemic constellation of the law of human dignity apropos other fundamental guarantees indicate how language such as 'life', 'integrity', 'inhuman or degrading treatment or punishment' are indispensable to the production of human dignity meaning.

At the regional level, human dignity language is practiced in instruments such as the *American Convention on Human Rights 'Pact of San Jose, Costa Rica'* (1969) or the *African (Banjul) Charter on Human and Peoples' Rights* (1986), where it is mentioned in the same breath as 'freedom, equality, justice' in the Preamble, and is understood considerably as the dignity for which the peoples of Africa are striving. Perceiving each such instance of practice as a legal language game conveys the richness of diverse particulars of meaning once the universal concept confronts the world of lived experience in each of these regions.

At the constitutional level, inviolability [*Unantastbarkeit*] is a famous *topos* in the order of the Basic Law [*Grundgesetz*] of the Federal Republic of Germany that presents interpretive complexity as regards its concretization[723]. Inviolability evokes the transcendental, understood presently apropos the notion of the limit and 'something always missing'. Art. 1 sec. 1 GG reads:

> (1) Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.
> (2) Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menscehnerechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigketi in der Welt.

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[722] See Catherine Dupré, 'What does dignity mean in a legal context? The UK can learn from Europe by enshrining dignity as a fundamental part of – rather than adjunct to – our human rights' (*Guardian,* 24 March 2011) <http://www.guardian.co.uk/commentisfree/libertycentral/2011/mar/24/dignity-uk-europe-human-rights> accessed 1 March 2014 ['These provisions offer a wide-ranging and inclusive definition of human dignity. For instance, the protection of "physical and mental integrity" is certain to cover a much wider range of situations than the extreme – and fortunately less frequent – instances of inhuman and degrading treatment and torture under article 3 ECHR […]. Similarly, the obligation to protect dignity at work resulting from the combined articles 5 and 31 ("Every worker has the right to working conditions which respect his or her health, safety and dignity") extends much further than the extremely rare instances of forced labour or slavery and anti-harassment legislation.']

[723] See Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857

> (3) Die nachfolgenden Grundrechte binden Gesetzgebung, vollziehende Gewalt und Rechtsprechung als unmittelbar geltendes Recht.

Translated:

> (1) Human dignity is inviolable. To respect and protect it is the duty of all state authority.
> (2) The German People therefore acknowledge inviolable and inalienable human rights as the basis of every human community, of peace, and of justice in the world.
> (3) The following basic rights are binding on legislature, executive, and judiciary as directly valid law.

Human dignity, the highest value of the legal order, is inviolable (*unanatastbar*). The state, that is, all three branches of state power, as Art. 1 sec. 3 GG provides[724], and all state and private actors must not only respect human dignity, but also protect it under Art. 1 sec. 1 sent. 2 GG.[725] Art. 1 sec. 2 GG declares the commitment of the German people to fundamental rights.[726] The word '*darum*' in Art. 1 sec. 2 GG effectively bridges the constitutional guarantee with the acknowledgement of the fundamental rights of all and, consequently, alludes to the universal minimum and justifies – perhaps even encourages – recourse to international and comparative law.[727] The commitment exceeds state borders: if Art. 1 sec. 1 sent. 2 GG suggests the responsibility to oppose any reality or regime that infringes on fundamental rights, not having delivered upon[728] human rights in the world effectuates the broadening of the scope of responsibility.

During the *travaux préparatoires* procedures for the Basic Law, the framers deliberated intensely on the legal framework of the protection of human dignity.[729] Expressing opposition to National Socialist ideology[730] and determined to reverse the

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[724] Kunig, Art. 1, *GG Kommentar* (2012) para 7; Denninger (1998) *JZ* 1129, 1129 [international human rights instruments post-UDHR and the guarantee under Art. 1 GG in German constitutional jurisprudence]
[725] Kunig, ibid para 1
[726] ibid
[727] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 3
[728] Baer, 'Triangle' 417 at 425, fn 11; Kunig (n 724) para 7 ['Dieser ist nicht nu rein Versprechen an die Völkergemeinschaft für die Rechtsentwicklung im Innern, zu dem zur Zeit der Verfassungsgebung aller Anlass bestand, sondern von brennender Aktualität, solange die Menschenrechte noch nicht global verwirklicht sind; […].']
[729] See Kunig (n 724) para 6
[730] Cf. Whitman, 'On Nazi "Honor" and the New European "Dignity"' 243, 243 [threads of continuity connect the fascist era with the era of dignity]; ibid ['The many, various and disturbing instances in which we discover Nazi origins of modern practices of "human dignity" have something in common: they are, for the most part, cases in which Nazi law aimed to vindicate claims of "honour", of *Ehre*.

national-socialist dogma of granting priority to the people, the *Volk*, over the individual, they incorporated into the constitutional text the negation of totalitarian conceptions of the state, which result in the devaluation of the individual human being. Devaluation need not be the manifest goal of totalitarian regimes; it suffices to ascertain that it constitutes an integral aspect of experiences prompted by them.[731]

Examples of other famous instances of constitutional practice of the law of human dignity, as the discourse in German and Anglo-American legal scholarship conveys, are the *Constitution of the Republic of South Africa* (1996)[732], the *Constitution of India* (1950), in the text of which human dignity language appears under the Directive Principles of State Policy, the *Basic Law of Israel* (1992), in which human dignity and liberty are spelled out at the very first Article, stating that their protection is the purpose of that law, or the *Constitution of Hungary* (2011)[733], which has been a point of controversy in Hungary and beyond, and could offer insights in the reflection of the transition from communism on the meaning of the law of human dignity. Though absent from the United States Constitution, human dignity is practiced as language in constitutional court jurisprudence and is considered by some American scholars a value underlying constitutional rights.[734]

B. Stories of 'something missing': practicing the law of human dignity in the jurisprudence of the Federal Constitutional Court of Germany

Human dignity is undoubtedly the norm most closely entwined with the life of citizens in a constitutional democratic state[735]. Consequently, it is practiced in a wide

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[…] *modern 'dignity', as we see it in continental legal cultures, is in fact often best understood, from the sociological point of view, as a generalisation of old norms of social honour.*']

[731] Kunig (n 724)

[732] Approved by the Constitutional Court in 1996 and took effect in1997.

[733] See Catherine Dupré, *Importing the Law in Post-Communist Transitions – The Hungarian Constitutional Court and the Right to Human Dignity* (Portland, Oregon: Hart Publishing, 2003); See also Frankenberg, 'Constitution-Building In Times Of Transition' (2001) 103 [Identifies three areas of challenges to constitutional theory: the relationship between transnational regimes and government institutions and how transnational norms can be 'constitutionalized', the existence of transnational regimes *sui generis*, such as the EU, and the expansion of the EU.]

[734] Michael M. Meyer, *The Constitution of Rights: Human Dignity and American Values* (William A. Parent ed, 1st edn, Ithaca: Cornell University Press, 1992)

[735]Habermas, 'The Concept of Human Dignity' (2010) *Metaphilosophy* 464, 469 [''Human dignity' performs the function of a seismograph that registers what is constitutive for a democratic legal order, namely, just those rights that the citizens of a political community must grant themselves if they are to be able to *respect* one another as members of a voluntary association of free and equal persons. […] The idea of human dignity is the conceptual hinge that connects the *morality* of equal respect for

range of contexts.[736] A serious shortcoming of the high degree of adaptability to diverse contexts is the danger of inflation of human dignity argumentation[737]. Thus, critical reflection is deemed necessary to avoid rendering the legal concept '*kleine Münze*'[738] [small change]. The advantages of the presence of human dignity outweigh, I argue, however this and other conceivable shortcomings of practicing an indeterminate and highly adaptable to meanings legal concept; most significantly the practice of human dignity in law reiterates the recognition of the subject-status of citizens by the state, an event of ontological and phenomenological significance. Provided processes of critical reflection are actuated in mobilizing the law of human dignity, practicing this language can guarantee the humanism of law. A hermeneutic and literary approach is most apt to setting up and demonstrating this interpretation of the legal concept.

The self-determined human being is the bearer of the dignity belonging to human beings *qua* beings. The FCC sees in the human being the individual within the community. The law of human dignity is practiced cumulatively with other legal values, such as the right to life, the general right to personality [*allgemeine Persönlichkeitsrecht*] and the principle of the social state. The five cases analyzed in the pages that follow are seminal instances of practice of the law of human dignity in FCC jurisprudence, as can be additionally deduced from German legal doctrine and Anglo-American legal scholarship. The ontological, linguistic-analytical and phenomenological analyses are preceded each time by an outline of the decision, significant doctrinal context, and the presentation of some key points in the respective areas of discussion, enhanced with comparative insights from positive or case law manifestations where deemed of elucidatory value.

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everyne with positive *law* and democratic lawmaking in such a way that their interplay could give rise to a political order founded upon human rights.']; 470 ['Because the *moral promise* of equal respect for everybody is supposed to be cashed out in *legal currency*, human rights exhibit a Janus face turned simultaneously to morality and to law […]. […] They are designed to be *spelled out in concrete terms* through democratic legislation […].']

[736] Kunig (n 724) para 8

[737] Giese, *Das Würde-Konzept* (1975) 14ff.; Geddert-Steinacher (1990) 15ff. fn 16

[738] Günter Dürig, 'Der Grundrechtssatz der Menschenwürde – Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. I in Verbindung mit Art. 19 Abs. II des Grundgesetzes' (1956) 81 *AöR* 117, 203 ['eiserne Ration']

I. The *Abortion I Case* (1975)[739]

In the *Abortion I Case* in 1975, a landmark FCC judgment that chronologically succeeded the 1973 United States Supreme Court *Roe v. Wade*[740] decision, the German constitutional judge pronounced the constitutionality of the criminalization of abortion, save, exceptionally, in indicated cases.

1. Decision (and dissenting opinion)

In the *Abortion I Case* the First Senate of the FCC judged the constitutionality of § 218a StGB after the 1974 reform of abortion law [*Fifth Statute to Reform the Penal* Law], which provided that abortions performed by a licensed physician with the consent of the pregnant woman within the first twelve weeks of pregnancy would not be punishable. The *Abortion I Case* should be read in context, namely in the historical, political and social context of abortion cases and public debate on this topic in the 1960s (United States) and the 1970s (Germany).

> Reform advocates planned to reconfigure the effective punitive law, which allowed for abortion only in cases of strict medical indication, when the pregnancy endangered the life of the mother (United States) or the life and physical health of the mother (Germany). The debate polarized both societies like almost no other topic of domestic policy because the issue of abortion touched upon sensitive questions regarding the beginning of human life, self-emancipation, and attitudes towards gender roles, family values, and religious beliefs. Radical women's rights groups advocated a broad liberalization, arguing that all penal restrictions should fall, while the Catholic Church backed the existing laws. Between these two extremes, some supported the decriminalization in cases of ethical, eugenic, and social indication, while others favored an abortion law that allowed abortion, at least for a certain time period. In the United States, the first pro-choice and pro-life groups were born.[741]

The federal government, 'the newly elected center-left coalition of the Social-Democratic Party (SPD) and the Liberal Party (FDP)'[742], supported the 'new, liberalized' Act. Pregnant women were legally required to consult a physician or a

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[739] BVerfGE 39, 1 (1975), First Senate of the FCC
[740] *Roe v. Wade*, 410 U.S. 113 (1973)
[741] Felix Lange, 'American Liberalism and Germany's Rejection of the National Socialist Past – The 1973 *Roe v. Wade* Decision and the 1975 German *Abortion I Case* in Historical Perspective' (2011) 12(11) *German Law Journal* 2033, 2036
[742] ibid; ibid 2036-37 ['After an extensive debate, the coalition adopted a reform law in 1973 – against the vote of the center-conservative opposition of the Christian Democratic/Christian Social Union (CDU/CSU) – that decriminalized abortion during the first twelve weeks of pregnancy.']

counseling agency prior to deciding whether they would undergo abortion. With the exception of abortions for medical, eugenic, or ethical reasons, for instance in case of rape or incest, criminal penalties would still apply for abortions performed after the twelfth week of pregnancy.[743]

Two thematic threads run parallel in the Court's legal syllogism: the penalization of abortion and the human dignity v. human dignity conflict. The FCC found the contested provision inconsistent with Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 GG 'to the extent that it excepts interruption of pregnancy from punishability if no reasons are present which […] have standing under the ordering of values [*Wertordnung*] of the Basic Law.'[744]. In linguistic-analytical terms, the Court identified the incompatibility of the statutory provision with the law of human dignity and the ordering of values in the constitution. Law and ethics can be portrayed as lenses before the eye of the judge. The specifics of this portrayal are explored *infra*.

The FCC found that the statute conflicted the constitutional duty to protect prenatal life. The decision was grounded on the fundamental right to life under Art. 2 sec. 2 GG in light of the state duty to respect and protect human dignity. The criminalization of abortion was held constitutional, although it was clearly expressed that prevention is preferable to punishment by means of penal measures. In accordance with the Basic Law, abortion is prohibited, save in cases demanding the interruption of pregnancy for reasons such as averting a danger to the life or to serious impairment of the health of the pregnant woman. Such and other indicated extraordinary burdens were excluded from penalization. In cases of social need, counseling and moral and practical assistance should be resorted to with the objective to encourage the pregnant woman to continue the pregnancy.

The petitions of one hundred and ninety three (193) members of the Bundestag and five (5) state governments, namely Baden-Württemberg, Bavaria, Rhineland-Palatinate, Saarland, and Schleswig-Holstein initiated the abstract judicial review proceeding before the FCC. The majority of petitioners were Christian Democrats. The question was whether the so-called regulation of terms of the *Fifth Statute to Reform the Penal Law* is consistent with the Basic Law. The petitioners claimed that the Act violated a range of Basic Law provisions, in particular the human

[743] See Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn, Durham and London: Duke University Press, 1997) 336
[744] BVerfGE 39, 1 (68)

dignity and right to life clauses. The FCC concluded that the protection of unborn life takes precedence as a matter of principle over the right of the pregnant woman to self-determination, rejecting the term solution alternative. The old law was reinstated, and, consequently, criminal penalties were imposed for abortions at any stage of pregnancy, with the exceptions indicated in the statute.[745]

The FCC called attention to the historical evolution of the legal treatment of abortion, noting the diachronically intense discussion on the matter in the public sphere and observing its multidimensionality on account of its proximity to the most fundamental questions of human existence. A remarkable range of arguments flesh out the syllogism that leads to the Court's decision. Examples of the range of concepts, issues, methodologies and sources of knowledge and experience drawn upon are the treatment of unborn life by the National Socialist Regime[746]; the biological-physiological beginning of the historical existence of human life, stressing the development of the fetus as a continuing process without clearly demarcated phases, and rendering the protection of the 'completed' human being an arbitrary, unavailing requirement; the legislative history of Art. 2 sec. 2 sent. 1 GG; consciousness as the basis of self-determination, limited though by the rights of others, the constitutional order and the moral law; continuity and potentiality as qualities of the human being; the disputed issue of whether the unborn is a bearer of the fundamental right ensuing from Art. 2 sec. 2 sent. 1 GG and Art. 1 sec. 1 GG as addressed in jurisprudence and scientific literature; the 'objective value order' [*objektive Wertordnung*] underlying the objective legal content of fundamental legal norms; and the social dimension of the interruption of pregnancy, which necessitates treating it as a concern exceeding the private sphere, despite the intimate character of the natural union between the pregnant woman and the child *en ventre sa mere*, thus requiring state regulation, investigation of and comparative perspectives on the tendency towards liberalization and modernization of measures against abortion in other democracies of the Western World. The Court deemed the latter, however, less critical a factor than the legal standards of the Federal Republic of Germany.

In the *Abortion I Case,* the majority of the Court characterized abortion 'an act of killing'. Law, the Court maintained, has to manifestly and clearly label the interruption of pregnancy an unjust act. The legislature can distinguish between

[745] See Kommers (1997) 336
[746] Hufen (2004) 313, 313

unborn and born life in determining the required and expedient protective penal measures. The disproportionate sacrifice of the pregnant woman in favor of unborn life should be presumed not only in cases of danger for her life or health, but also in cases of general emergency, particularly social conflict. The didactic stance towards the pregnant woman and society as a whole is evident in the majority opinion, particularly in the argumentation on the sociological implications of penal norms for the guarantee of respect for the value of life: the pregnant woman should be reminded of her fundamental duty to respect the right to life of the unborn, and, moreover, a decision to undergo abortion, when neither material distress, nor emotional conflict are experienced, is 'arbitrary'. The passionate discourse on abortion, observed the Court, could be a sign that unborn life is no longer fully respected in a considerable segment of the population. Legal consequences are instructive and formative, in the Court's view, of how society understands 'right' and 'wrong'. Purely theoretical announcements do not suffice for expressing the legal order's socio-ethical disapproval of abortion. In line with this position, the FCC engaged in a pragmatic assessment of the social phenomenon of abortion, for instance of the various motives leading pregnant women to interrupt pregnancy and of the actual effectiveness of state regulation.

The dissenting opinion of Justice Rupp-von Brünneck[747] and Justice Simon[748] raised predominantly constitutional review and separation of powers considerations as

[747] Donald P. Kommers, 'Wiltraut Rupp-von Brünneck' in Rebecca Mae Salokar & Mary L. Volcansek (eds), *Women in Law: A Bio-Bibliographical Sourcebook* (Greenwood 1996) 277, 277-79 ['Justice Wiltraut Rupp-von Brünneck was an associate justice of West Germany's Federal Constitutional Court from 1963 to 1977. She was the only woman among the Court's 16 members during her 14 years on the German Federal Republic's highest court of constitutional review. Elected to fill the seat on the First Senate vacated by Justice Erna Scheffler, the only other woman to have been appointed to the Court in the first 26 years of its existence, she distinguished herself as an independent-minded judge of enormous talent and sensitivity. [She] […] was also a controversial judge and the author of some of the Court's most notable dissenting opinions during her tenure of office. […] Her commitment to the defense of women's interests appeared early. At Berlin and Heidelberg, she helped organize a group of women law students dedicated to defending women academicians and lawyers against the National Socialist effort to keep them out of the professions. […] Wiltraut von Brünneck was present at the creation of the West German Federal Republic. As Georg-August Zinn's personal assistant in his capacity as chairman of the Parliamentary Council's Constitutional Court Committee and member of its Committee on Basic Rights, she was among the 'insiders' behind the scenes who had the rare privilege of witnessing and contributing to the Council's work as the Basic Law was being debated and drafted. […] She was an active member of the Evangelical Church in Hesse and Nassau, and a member of the executive committee of Germany's Federation of Women Lawyers […]. She was also active in the German-French Women Lawyer's [sic] Association. […] Von Brünneck was the SPD's unanimous choice to fill the open seat on the First Senate.']

[748] Justice Helmut Simon served as constitutional judge from 1970 to 1987 and was the President of the German Evangelical Church Assembly (1977-1989) and the *Zentralstelle für Recht und Schutz der Kriegsdienstverweigerer aus Gewissengründen* (1993-2000).

regards the majority opinion. The authority to annul decisions of the legislator should be exercised with restraint in order to avoid imbalance between state powers within the constitutional state. Referring to judicial self-restraint[749] as the 'elixir of life' [*'Lebenselexier'*][750] of FCC jurisprudence, the dissenters maintained that such a decision falls within the scope of legislative responsibility and that a duty of the state to punish abortion in every stage of pregnancy could not be derived from the constitution. The legislator is entrusted with decisions re the regulation of terms or indications solutions and the provision for counseling and moral or practical assistance to the pregnant woman.

The dissenting Justices furthermore reacted to the imposition of penal measures, in other words the strongest conceivable encroachment into the freedom of the citizen, while noting the oxymoron of protecting fundamental rights by employing norms that, in fact, infringe on those. Moreover, they revisited the implications of the relationship between the pregnant woman and the child *en ventre sa mere* and the analogy between abortion and the killing of independently existing life. Finally, they pragmatically evaluated a range of dangers associated with illegal interruptions of pregnancy. In a nutshell, the dissenting Justices maintained that the Basic Law did not prevent the legislature from dispensing with penal measures in dealing with abortion. The dissenters opted for socially adequate means, which they considered more compatible with the spirit of the constitution.

In the 1993 *Abortion II Case*[751] the Second Senate of the FCC maintained the essential core of *Abortion I*, while tailoring protection to the circumstances and needs of post-unification Germany.[752] The main point of divergence between the *Abortion II Case* and the *Abortion I Case* was that non-indicated abortions performed during the first trimester, while unjustified and illegal, remained unpunished. Kunig appreciates that the shift of the Court's position in the *Abortion II Case* led to the fortification of the protection of developing life, without resolving the controversy in favor of either one of the legal-political competing models.[753]

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[749] Schnapp (1989) 1, 8
[750] BVerfGE 39, 1 (69)
[751] BVerfGE 88, 203 (1993), Second Senate of the FCC
[752] See Kommers (1997) 349; Denninger (1998) *JZ* 1129, 1129f.
[753] Kunig, Art. 1, *GG Kommentar* (2012) para 14

2. Discussion

The Court's decision demonstrates the conflict between two legal values: the life developing itself in the womb of the mother and the self-determination of the pregnant woman. The duty to protect unborn life deduced from Art. 2 sec. 2 sent. 1 GG and Art. 1 sec. 1 sent. 2 GG, in the Court's view, should be understood both negatively and positively. The state should not only refrain from infringements on life, but also foster and protect it against illegal attacks by others, even against the mother. Measures directed towards guaranteeing the actual protection of unborn life should prove commensurate to the importance of the legal value *enjeu.* In extreme cases of non-compliance the legislator can resort to the threat of punishment, although criminal law measures were clearly understood by the FCC as the ultimate means to dealing with abortion.

The law of human dignity and violations of human dignity are not identical to the right to life and violations of human life.[754] The subjective scope, that is, the bearers, and the objective scope, namely the protected interests, of Art. 2 sec. 2 sent. 1 GG and Art. 1 sec. 1 GG are not indistinguishable.[755] Not all human dignity violations cause or aim at the death of human beings affected and, conversely, not all instances of depriving another human being of life amount to an affront on human dignity under Art. 1 sec. 1 GG.[756] According to some voices in German legal scholarship, the guarantee of human dignity and the protection of life should be decoupled.[757] Disengaging the two legal norms does not mean that depriving a human being of his or her life cannot be at the same time a violation of human dignity; the purpose of dissociation is, rather, to disallow an automatic deduction of the occurrence of a human dignity violation from the event of a violation of human life.[758]

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[754] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 67; Kunig, ibid para 14

[755] Dreier, ibid

[756] ibid

[757] This is the dominant opinion in the discourse: Dreier, ibid para 67; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 125; Dreier, 'Menschenwürdegarantie und Schwangerschaftsabbruch' (1995) *DÖV* 1036, 1037; Udo Fink, 'Der Schutz des menschlichen Lebens im Grundgesetz – zugleich ein Beitrag zum Verhältnis des Lebensrechts zur Menschenwürdegarantie' (2000) *Jura* 210, 211; ibid 216; Michael Anderheiden, '"Leben" im Grundgesetz' (2001) 84 *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 353, 354; ibid 380; Edzard Schmidt-Jortzig, 'Systematische Bedingungen der Garantie unbedingten Schutzes der Menschenwürde in Art. 1 GG – unter besonderer Berücksichtigung der Probleme am Anfang des Lebens' (2001) *DÖV* 925, 926ff; ibid fn 13; Opposite opinion: Michael Kloepfer, 'Leben und Würde des Menschen' in Peter Badura & Horst Dreier (eds), *FS 50 Jahre BVerfGE* (Bd. 2, Tübingen: Mohr Siebeck Verlag, 2001) 77, 78ff. [pairs up human dignity and life]

[758] Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857, 859 [circumstances under which the deduction of a violation of human dignity from the infringement on life is valid]

Strack understands frequent efforts to decouple the protection of human dignity under Art. 1 sec. 1 GG from the protection of life under Art. 2 sec. 2 sent. 1 GG and to 'award' [*zusprechen*][759] the fertilized egg only the protection of life to be led by an intention to bypass the unlimited guarantee of human dignity in order to ground a statute that permits interventions in life in Art. 2 sec. 2 sent. 3 GG. Even then, notes Starck, the legislature would recognize, in applying the constitutional protection of life, that the fertilized egg is human life. Interference with the life of a human being is only justified when the life of another human being is threatened and the danger can only be averted by means of depriving the former of life. The fertilized egg, observes Strack, does not threaten anyone, save in the case of the medical indication, in which the life of the mother is in danger.[760]

Ambiguity and controversy about the meaning of human being-ness and human dignity becomes all the more manifest and persistent in abortion jurisprudence[761]. Who is the human being? The human being is the being begotten by a human being[762]. What does human dignity mean? Responding to these questions within the realm of law presents distinct complexity for a number of reasons. The wide discretion as to the kind of statutory means[763] materializing the duty to protect that ensues from the law of human dignity can lead to indeterminacy.[764] Starck claims that, due to the high status of the legal interest of protecting unborn life, administrative law measures are insufficient; rather, criminal law provisions are required.[765] Art. 2 sec. 2 sent. 1 GG, not Art. 1 sec. 1 GG, dictates '[w]hether and under which standards' abortion should be punished[766], argues Kunig, despite the recognition of the status of the bearer of fundamental rights to unborn life under the latter provision. Benda demonstrates how the debate on abortion triggers

[759] Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 119 ['[…] was die Menschen einander zusprechen, sich als Rechtsgenossen versprechen.']
[760] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 20
[761] Ernst Benda, 'Verständigungsversuche über die Würde des Menschen' (2001) *NJW* 2147, 2147f.; ibid 2150
[762] Kunig (n 753) para 12
[763] Whether the protection of human dignity under the auspices of civil law instead of criminal law would prove sufficient and appropriate a regulation is extensively discussed in constitutional doctrine. Kunig, ibid para 32; Starck (n 760) para 42 [*Ehrenschutz*]
[764] See Kunig ibid
[765] BVerfGE 39, 1 (47); BVerfGE 88, 203 (258); See also on the nexus between constitutional and criminal law measures, BVerfGE 6, 389 (433 f.) (1957) [homosexuals]; BVerfGE 57, 250 (270) (1981) [V-Mann]; BVerfGE 73, 206 (253) (1986) [Sitzblockaden I]; Starck (n 760) para 94
[766] Kunig (n 753) para 32; See also Starck (n 760) para 42 [protection of human life as the existential foundation of human dignity and the necessity of criminal law means for the protection of human life]; ibid para 94 [fundamental rights considerations (human dignity, human life) in the abortion discourse]

constitutional review and is problematized as a separation of powers discussion, and concludes that decision-making in this area of discourse falls under the responsibility of the parliament.[767] Art. 1 sec. 1 GG guarantees the human dignity *'des Menschen'*, namely of the human being, rather than the dignity of human life.

What can be inferred from the course of human dignity in the history of ideas and its constitutional genesis is that it concerns born persons[768]. Human beings are not to be treated as animals or 'non-human' beings. The protection of unborn life is not contemplated on in the philosophical background of human dignity.[769] Equally, resorting to theoretical grounds does not promise the determination of the subjective protective scope of the norm. Looking at the protection of unborn life through the lens of different theoretical accounts of human dignity permits an appreciation of possible theoretical responses to the question of who the bearer of human dignity is. [770]

The *Leistungstheorie* calls for the assessment of human performance, of which an embryo is not capable by nature [*naturgemäß*].[771] The *Kommunikationstheorie* anchors the idea of human dignity to inter-human solidarity and concrete community of – mutual – recognition. As a result, everyone, regardless of his or her actual capabilities, is a bearer of human dignity, except the embryo before implantation.[772] Arguably, grounding an understanding of human dignity entirely on communicative interaction and on the embedding of human beings in a community united in solidarity and founded on mutual respect[773] 'must stand at a distance from a claim to human dignity on the part of the embryo'[774]. Nevertheless, alternative courses of determination such as considering the moment of birth the decisive point in the development of human life, drawing demarcating lines between stages of development accordingly, and protecting the unborn child differently from the newborn are also marked by ambiguity, as noted by the dissenters in the *Abortion I Case*.

The human dignity of the embryo at the early stages of pregnancy could alternatively be understood in light of 'a broadly understood *Mitgifttheorie* [dowry

[767] Benda (2001) *NJW* 2147, 2150
[768] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 82
[769] ibid
[770] ibid para 84
[771] ibid
[772] ibid para 84; Erhard Denninger, 'Embryo und Grundgesetz. Schutz des Lebens und der Menschenwürde vor Nidation und Geburt' (2003) 86 *KritV* 191, 206f.
[773] See Hofmann, 'Die versprochene Menschenwürde' (1995) 104
[774] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 66f.

theory]'[775]: the embryo is invested with the capabilities that belong uniquely to the species of human beings [*Menschen als Gattungswesen*].[776] In accordance with *Mitgifttheorien*, the idealistic variant offered in the thought of Kant, who centers on the concept of the person, has to be rejected as inappropriate, because drawing an analogy between this perception of the human being and unborn life would probably, Dreier notes[777], bring about misunderstanding.[778] Turning to the *imago-Dei*-conception and its interpretations in Catholic or Protestant doctrine requires careful contextualization in light of the historical background of the dogmas.[779] Such inferences should remain attuned to the secular and ideologically neutral state of the Basic Law, within which religious beliefs cannot dominate the interpretation of the prominent norm of the guarantee of human dignity under Art. 1 sec. 1 GG.[780]

The crucial question in the context of abortion concerns the standards for interpreting and applying the duty of the state to protect developing life.[781] Factors influencing the standards of protection of the human dignity of prenatal life have been identified in FCC jurisprudence[782]. The majority of the Court in the *Abortion I Case* established the human dignity of the embryo on the potentiality of capabilities associated with human existence [*menschlichen Sein*].[783] The process of formulation of the identity of an individual human being, the continuity of maturation, the distinction between artificially induced and natural development in view of the advance of biotechnological methods, for instance *in vitro* fertilization or the creation of an embryo through cloning, and the balancing of the original development perspective with consideration of parental will to permit it as in the case of supernumerary embryos [*'überzähliger' Embryonen*][784] are illustrative examples of considerations associated with the protection of prenatal life in scholarly discourse.

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[775] Herdegen, ibid para 32
[776] ibid para 62 ['Totipotenz ist nicht schlicht mit Würdehaftigkeit gleichzusetzen.']
[777] Dreier (n 768)
[778] Dreier ibid; See also Kurt Seelmann, 'Menschenwürde und die zweite und dritte Formel des Kategorischen Imperativs. Kantischer Befund und aktuelle Funktion' in Gerd Brudermüller & Kurt Seelmann (eds), *Menschenwürde – Begründung, Konturen, Geschichte* (Würzburg: Königshausen & Neumann, 2008) 67
[779] Dreier ibid
[780] ibid
[781] Kunig, Art. 1, *GG Kommentar* (2012) para 14
[782] Herdegen (n 774) para 64 ['[…] aber noch nicht hinreichende Komponenten des pränatalen Würdeschutzes […]']
[783] BVerfGE 39, 1 (41); Herdegen, ibid para 63
[784] ibid para 64

The majority opinion in the *Abortion I Case* sets the beginning of life and, consequently, the recognition of human dignity[785] and the protection of fundamental rights on the 14th day after conception[786]; before that day multiple pregnancy is still possible. Life before the 14th day is human in kind, but not individualized human life, not an *Individuum* but rather a *Dividuum*, or indeed human life but not a human being. Fundamental rights and the guarantee of human dignity are, however, individual-related [*individualbezogen*].[787] 'Of the human being' [*des Menschen*] in Art. 1 sec. 1 GG and 'everyone' [*jeder*] in Art. 2 sec. 2 sent. 1 GG denote the individual rather than human life in general. [788] Dreier explains that if we understand those rights as a type of bridge-construction that supports and affirms proactively – or, 'better', retroactively – the effects [*gestützte Vorwirkung*] of the guarantee of human dignity at the stage before birth, then the effectiveness of this guarantee cannot extend further than the point of implantation, namely the stage of individuation of unborn life.[789] Implantation[790] has been upheld as the critical point for ascertaining the 'genetic identity and along with it the uniqueness [*Einmaligkeit*] and distinctiveness [*Unverwechselbarkeit*] of an already established and no longer divisible life'[791] that develops as – rather than into – a human being. The FCC has, however, not recognized the status of a legal subject to the unborn human being to present.[792] What is more, the protection of human dignity before birth has not been contoured thus far in FCC jurisprudence. In line with FCC jurisprudence and the dominant opinion in the

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[785] See Wolfram Höfling, 'Wer definiert des Menschen Leben und Würde?' (2007) *FS Isensee* 525, 530f.

[786] Majority opinion, BVerfGE 39, 1 (37) ['Leben im Sinne der geschichtlichen Existenz eines menschlichen Individuums besteht nach gesicherter biologisch-physiologischer Erkenntnis jedenfalls vom 14. Tage nach der Empfängnis (Nidation, Individuation) an […].']; Dissenting opinion, BVerfGE 39, 1 (80) ['Die biologische Kontinuität der Gesamtentwicklung bis zur Geburt […] - deren Beginn bei konsequenter Anwendung der Mehrheitsauffassung nicht erst bei der Einnistung, sondern bei der Empfängnis anzusetzen wäre - ändert nichts daran, daß den verschiedenen Entwicklungsstufen des Embryos eine Veränderung in der Einstellung der Schwangeren im Sinne einer wachsenden mütterlichen Bindung entspricht.']

[787] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 83

[788] ibid para 66

[789] ibid

[790] BVerfGE 39, 1 (41); BVerfGE 88, 203 (251 ff.) [with cautious notice regarding the period before implantation]; For the doctrinal discourse, see Herdegen (n 774) para 65 fn 5; ibid para 111 [measures preventing the implantation foreclose the chances of the beginning and development of life]

[791] BVerfGE 88, 203 (251 f.)

[792] The *Abortion I Case* left the question whether the embryo is a legal subject, namely a subject of fundamental rights, open. Establishing the legal status of the embryo was also resisted to in the *Abortion II Case*. Herdegen (n 774) para 63 ['Es ist schwer verständlich, dass sich das *Bundesverfassungsgericht* […] bislang nicht zur ausdrücklichen Anerkennung der Rechtssubjektivität des Ungeborenen durchzuringen vermochte.']

literature the unborn [*nasciturus*] is a bearer of human dignity under Art. 1 sec. 1 GG.[793]

The FCC declared in the *Abortion I Case*, 'where human life exists, human dignity is present to it'[794], and the *Abortion II Case* fundamentally affirmed this proposition, yet in an even darker [*dunkler*][795], as Dreier puts it, statement: 'This dignity of being human lies also for unborn life in its existence for its own sake.'[796] This view has been deemed ambiguous on the grounds that it is insufficiently justified; the position puts forward a categorical formulation lacking normatively evaluative reasoning [*normativ wertenden Begründung*] and, instead, rests on biological-naturalistic fallacies[797]. As Dreier notes, the understanding of human life that originates in biology or the natural sciences does not automatically bring about the status of the bearer of human dignity[798]; his point is of obvious pertinence to the ontological, linguistic-analytical and phenomenological accounts of human dignity presently construed. If such propositions carry prescriptive meaning, then the tautology implied in the phrasing 'for its own sake', ambiguous and dark as it may be, can be understood as the linguistic substantiation of the guarantee of human dignity.

Resting solely on biological and scientific facts could be perceived as a stance of abstention from drawing distinctions between evaluative viewpoints in human dignity theories. The charge of fallacy cannot be challenged on the grounds that there are other temporal demarcation lines that can be drawn without resorting to biological-scientific facts. The decisive factor is, rather, the realization that solely the reference to such facts cannot be the substantive content of the status of the bearer of human dignity within the realm of law; normative reasons and justifications are also called for. These are required even if we resist regarding vague references to potentiality as the critical feature of human being-ness and, consequently, of human dignity in law.[799]

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[793] For positions in the discourse, see Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 66

[794] BVerfGE 39, 1 (41) ['Wo menschliches Leben existiert, kommt ihm Menschenwürde zu […].']; This proposition, however, does not necessarily facilitate the determination of the protection of human dignity of prenatal life. Herdegen (n 774) para 66f.;

[795] Dreier (n 793)

[796] BVerfGE 88, 203 (252) ['Diese Würde des Menschseins liegt auch für das ungeborene Leben im Dasein um seiner selbst willen.']

[797] Dreier (n 793); Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 114 [Hofmann's thesis departs from an understanding of human dignity as a 'Seinsgegebenheit', a quality or characteristic of the individual]

[798] Dreier ibid

[799] Dreier ibid

As far as the human dignity of prenatal life is concerned, uncertainty about the subjective scope of protection calls for the amplification of justificatory standards for ascertaining human dignity violations in particular forms of treatment.[800] FCC jurisprudence established the non-penalization of abortion in the *Abortion II Case*[801], presuming necessarily that the protection of human dignity is contingent on the stages of development of life. Interestingly, the language of *'Unentdecktheit'* [the state of not being discovered or being concealed] appears in the *Abortion II Case* legal language game to portray the relation between the pregnant woman and the child.[802]

> The duty to respect the dignity of the human being relates typically to the subject of interhuman relations. In a stage of human development, in which it is difficult to render such relations concretely tangible [*konkret schwer erlebbar sind*], the assumption of human dignity violations demands great cautiousness.[803]

The balanced overall appreciation [*der bilanzierenden Gesamtbetrachtung*] of stages of development[804] is another proposed method of ascertainment of the constitutional protection of unborn life. The standards of respect deduced therefrom are not subject to further balancing, just as in the case of life after birth.[805] The concrete standard for the guaranteed protection of the embryo in FCC jurisprudence is in fact not derived from Art. 1 sec. 1 GG but rather from Art. 2 sec. 2 GG (*Abortion II Case*[806]). The normative basis for the protection of unborn life from abortion by the state is derived apodictically [*apodiktisch*] from Art. 1 sec. 1 sent. 2 GG; the due standard of protection is however determined, again apodictically [*ebenfalls*

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[800] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 70

[801] BVerfGE 83, 203 (251)

[802] BVerfGE 83, 203 (266) ['Sie allein und nur von ihr selbst ins Vertrauen Gezogene wissen in diesem Stadium der Schwangerschaft um das neue Leben, das noch ganz der Mutter zugehört und von ihr in allem abhängig ist. Diese Unentdecktheit, Hilflosigkeit und Abhängigkeit des auf einzigartige Weise mit der Mutter verbundenen Ungeborenen lassen die Einschätzung berechtigt erscheinen, daß der Staat eine bessere Chance zu seinem Schutz hat, wenn er mit der Mutter zusammenwirkt']; See also Herdegen (n 800) para 69; ibid para 60 fn 5; Ralf Müller-Terpitz, *Der Schutz des pränatalen Lebens – Eine verfassungs-, völker- und gemeinschaftsrechtliche Statusbetrachtung an der Schwelle zum biomedizinischen Zeitalter* (Tübingen: Mohr Siebeck, 2007) 349ff. [critical]; Edzard Schmidt-Jortzig, 'Systematische Bedingungen der Garantie unbedingten Schutzes der Menschenwürde in Art. 1 GG – unter besonderer Berücksichtigung der Probleme am Anfang des Lebens' (2001) DÖV 925 at 930 [resisting the tailoring of protection to the stages of development of unborn life leaves us helpless before the question of determination of the beginning of human dignity in human life]

[803]Herdegen (n 800); See also Hofmann, 'Die versprochene Menschenwürde' (1995) 104 [relational, communication-based understanding of human dignity]

[804] Matthias Herdegen, 'Der Würdeanspruch des Embryo in vitro – zur bilanzierenden Gesamtbetrachtung bei Art. 1 Abs. 1 GG' in Söllner, Gitter, Waltermann, Giesen & Ricken (eds), *Gedächtnissschrift für Meinhard Heinze* (2005) 357, 363f.

[805] Herdegen (n 800) para 60

[806] BVerfGE 83, 203 (251)

apodiktisch], by Art. 2 sec. 2 sent. 1 GG.[807] It is argued that such jurisprudential deductions sacrifice the consistency of fundamental rights doctrine 'at the altar of outcome-oriented malleability [*Geschmeidigkeit*]'[808], probably in pursuit of consensus within the FCC[809].

According to certain voices in German legal scholarship, it still remains unclear why abortion should be framed from a constitutional law perspective as a human dignity violation,[810] since identifying the infringement on this area of protection with a violation of human dignity[811] is of limited heuristic value. On the other hand, interference with life as the vital basis of human dignity[812] does not as such suffice as a justification for human dignity violations, since, as noted previously, not every act causing final death [*Tötung*] need infringe on human dignity. Be that as it may, it is claimed that, as far as physical existence is concerned, the protection of human dignity is tantamount to the protection of life as advanced in the *Abortion I Case* and the *Abortion II Case*[813], since human life is the vital basis of human dignity[814] and as such a value of the highest rank [*Höchstwert*][815]. With respect to the embryo, the protection of human dignity is exhausted in protecting life.[816]

In the *Abortion I Case* the FCC held that the existence of unborn life has priority over the free development of the personality of the mother[817], for whom the child could be, in the worst case, only a burden.[818] Precisely because what is at issue is the guarantee of human dignity, the fundamental rights of the mother do not go so far as to permit the interruption of pregnancy during the first months in general.[819] Since abortion always leads to the termination of unborn life, an actual balance between two colliding rights does not come into question.[820] The permission of

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[807] Herdegen (n 800) para 112; ibid para 112 fn 3; Rolf Stürner, 'Das Bundesverfassungsgericht und das frühe menschliche Leben – Schadensdogmatik als Ausformung humaner Rechtskultur?' (1998) *JZ* 317, 319
[808] Herdegen (n 800) para 112; Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 70
[809] Herdegen, ibid para 112
[810] ibid
[811] ibid para 73
[812] Life (also past [*auch vergangenes*]) is *conditio sine qua non,* but not *conditio per quam* of Art. 1 sec. 1 GG. Dreier (n 808) para 67
[813] BVerfGE 39, 1 (41); BVerfGE 88, 203 (252)
[814] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 17; ibid para 92
[815] ibid para 92
[816] ibid para 17
[817] See BVerfGE 88, 203 (267)
[818] Starck (n 814) 94
[819] ibid
[820] ibid

abortion during the first three months and the protection thereafter does not amount to a balancing from the perspective of individual unborn life for which constitutional protection is valid.[821] Attention is thus focused on the – soundly – assumed viewpoint of the unborn.

The *Abortion I Case* constitutes an example of the possibility of restrictions on human dignity in favor of life as its vital basis.[822] To the extent that human dignity is violated, the proper standard for respect and protection is Art. 1 sec. 1 GG, also in view of the third-party effect of the inviolability of human dignity guaranteed thereby[823] and of Art. 1 sec. 2 GG [*Drittwirkung*][824]. The direct third-party [*unmittelbare*, unmediated] effect of Art. 1 sec. 1 sent. 1 GG[825] can be deduced from the remark that the framers of the constitution did not bracket Art. 1 sec. 1 sent. 1 and sent. 2 GG under one and the same proposition, for instance: 'All state authority respects and protects human dignity'.[826] Safeguarding human dignity from interference by others[827], in other words protecting it against all possible attackers[828], is delivered upon on the part of the state first through the legal order and the enforcement of the law, but also, preventively, through enlightenment and information, the guarantee of education [*des Schulwesens*] and ultimately through state action in its entirety.[829]

Respect for the human dignity of the individual can be in conflict with the duty to protect under Art. 1 sec. 1 GG. Should the state be kept from dissuading the individual from conduct that interferes with the guarantee of human dignity [*würdelosem*] or from prohibiting actions threatening human dignity? Can the state protect the individual from his or her own conduct? Priority is regularly granted to the claim to autonomy rooted in the demand to respect human dignity[830]. The basis of

[821] BVerfGE 88, 203 (255 f.); Starck, ibid
[822] BVerfGE 39, 1 (42); Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 73 fn 4
[823] Herdegen, ibid para 112
[824] Herdegen, ibid para 74; See BVerfGE 24, 119 (144) ['Eine Verfassung, welche die Würde des Menschen in den Mittelpunkt ihres Wertsystems stellt, kann bei der Ordnung zwischenmenschlicher Beziehungen grundsätzlich niemandem Rechte an der Person eines anderen einräumen, die nicht zugleich pflichtgebunden sind und die Menschenwürde des anderen respektieren'.]; Kunig, Art. 1, *GG Kommentar* (2012) para 27; Klaus Stern, 'Menschenwürde als Wurzel der Menschen- und Grundrechte' (1983) *FS Scupin* 627, 635f.
[825] The direct third-party effect also applies to Art. 9 sec. 3 sent. 1 GG.
[826] Kunig (n 824)
[827] BVerfGE 1, 97 (104) (1951) [*Hinterbliebenenrente*] ['Wenn Art. 1 Abs. 1 GG sagt: 'Die Würde des Menschen ist unantastbar', so will er sie nur negativ gegen Angriffe abschirmen.']; Kunig ibid para 31
[828] Dürig, Art. 1 Abs. 1, *Grundgesetz: Kommentar* (1958) para 3
[829] Kunig (n 824)
[830] ibid para 34

authorization of state intervention in such cases could be the protection of public safety, that is, the interest of third parties.[831]

According to some voices in legal literature, the refusal of pregnancy alone does not amount to a violation of human dignity.[832] Rather, an affront to the human dignity of the embryo is found, for instance, when an interruption of pregnancy is motivated by a selection on grounds of gender or criteria of 'positive' eugenic, or in order to use the aborted fetus for research purposes.[833] Medical liability for interruptions of pregnancy in the case of physical or mental disability of the unborn child, framed as the problem of the 'child as damage' [*Kind als Schaden*][834], merits separate attention. This issue was a point of disagreement among the Senates of the FCC. The conferring of a claim against the doctor to undertake the maintenance of the child is perceived in the relevant criticism as an improper commercialization of human existence [*Daseins*].[835] The Second Senate of the FCC opposed in an *obiter dictum* the legal qualification of the existence of a child as source of damage[836], considering this perception of human life a violation of Art. 1 sec. 1 GG.[837] Those in favor of the opinion of the First Senate clarified that the legal sense of the damage contention refers solely to the maintenance expenses related to the birth of a child, not to the existence of a human being; thus, it violates neither the child's claim to respect, nor the undertaking of responsibility by the parents.[838] A claim to compensation for damages on the part of the child that endures an undesired, 'wrongful life', against the doctor who treated the pregnant mother[839], as in many cases of serious disability, has

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[831] ibid para 27

[832] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 112; Cf. Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 94

[833] Herdegen, ibid

[834] Herdegen, ibid 119; Stürner (1998) 317 [on the controversy in FCC jurisprudence re the *'Kind als Schaden'* and comparative insights]; ibid 330 ['Die Einordnung planwirdiger und vor allem behinderter Geburt ins Schadensersatzrecht ist gesellschaftspolitisch das falsche Signal […].'] The 'false signal' brings to mind the association of the legal condemnation of abortion with the cultivation of individual and collective legal consciousness. Stürner links the 'false signal' to the responsibility of the FCC in concretizing constitutional provisions to further a legal culture in line with humanism; Hufen (2004) 313, 313f.; Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 160

[835] Dreier, ibid; Stürner (n 834) 324 ff.; ibid 325 [emphasis on the future impact of the claim against the doctor to undertake the maintenance of the self-consciousness and self-understanding of the child]

[836] BVerfGE 96, 409 (411 ff.) (1997) [*Plenarvorlagen*] [Contrary to the opinion of the First Senate on the issue, the Second Senate used as legal basis the duty of the state to respect 'all human beings in their existence for their own sake' [*jeden Menschen in seinem Dasein um seiner selbst willen zu achten*; BVerfGE 88, 203 (296)] in deciding the case before it.]

[837] Dreier (n 834); See BVerfGE 88, 203 (296); BVerfGE 96, 409 (409, 413)

[838] Dreier, ibid para 160 fn 548

[839] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 123

been declined[840] in German jurisprudence. Solidarity and fraternity extend, beyond the relation to fellow human beings, to the responsibility towards future generations. Strack argues that the guarantee of human dignity requires consideration of future generations, 'because human beings live in generational communities due to their reproductive ability.'[841]

Turning our sights to language games produced at a political level, under paragraph 8.25 under the section 'Women's health and safe motherhood' of the *Programme of Action* of the 1994 International Conference on Population and Development (ICPD) in Cairo it is stressed that 'in no case should abortion be promoted as a method of family planning.' At the same time governments and intergovernmental and non-governmental organizations are 'urged to strengthen their commitment to women's health, to deal with the health impact of unsafe abortion' and 'reduce the recourse to abortion through expanded and improved family-planning services.' [842]

> Prevention of unwanted pregnancies must always be given the highest priority and every attempt should be made to eliminate the need for abortion. Women who have unwanted pregnancies should have ready access to reliable information and compassionate counselling. Any measures or changes related to abortion within the health system can only be determined at the national or local level according to the national legislative process. In circumstances where abortion is not against the law, such abortion should be safe. In all cases, women should have access to quality services for the management of complications arising from abortion. Post-abortion counselling, education and family-planning services should be offered promptly, which will also help to avoid repeated abortions.[843]

Considering the jurisprudence of the Supreme Court of the United States following *Roe v. Wade* (1973)[844] which held that government may not prohibit abortions prior to viability and that the regulation of abortions had to meet strict scrutiny, the Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)[845] repudiated the trimester framework but upheld the central holding of *Roe v. Wade* as regards viability. The state has a substantial interest throughout the

[840] Dreier (n 834); ibid para 161; Stürner (1998) 317, 318
[841] Starck (n 839) para 11
[842] A/CONF.171/13/Rev.1
[843] ibid
[844] *Roe v. Wade*, 410 U.S. 113 (1973)
[845] *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992)

pregnancy. What is at stake is the right of the pregnant woman to make the ultimate decision, not the right to be insulated from all others in doing so. Before viability the state cannot ban abortion, since that would mean granting priority to the fetus over the woman; still, the state can express its interest in potential life so long as no substantial obstacle is imposed on the freedom of the woman to exercise her right.

After the point in time when viability is established, the state can ban abortion altogether but has to make an exception where necessary to protect the life and health of the mother. What kind of right is being protected? Drawing the line at viability suggests that it is the right of the mother not to have her body conscripted to bring the child into the world that should be addressed, and that the decisions of the mother about her life, more broadly understood, are protected. Since *Casey,* Supreme Court jurisprudence on abortion has concentrated on restrictions on partial birth abortion[846] and exceptions for the protection of the health of the mother[847].

Under Art. 54 sec. 1, the Hungarian Constitution provides that 'everyone has the inherent right to life and to human dignity' and 'no one shall be arbitrarily denied of these rights.' The Hungarian Constitutional Court affirmed the centrality of individuality, identified potentiality as a quality of human life and associated the right to self-determination of the mother with human dignity and privacy.[848] The language employed in the decision brings to mind the themes encountered in the *Abortion I Case.* The Hungarian constitutional judge indeed explicitly resorted to FCC jurisprudence, the *Abortion II Case*, and drew on the thereby established individual right to life of the fetus.[849]

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[846] See *Stenberg v. Carhart* 530 U.S. 914 (2000) [The Court declared a state law that prohibited the 'dilation and extraction' 'partial birth abortion' procedure, defined as an abortion procedure in which the person performing the abortion partially delivers into the vagina a living unborn child before killing the unborn child and completing the delivery (as opposed to 'dilation and evacuation' procedure where fetus is killed and dismembered inside womb and then extracted), unconstitutional.]

[847] See *Gonzales v. Carhart* 505 U.S. 124 (2007)

[848] Decision 48/1998 (XI. 23.) AB ['Individuality is the key word even if, for the sake of circumspection, one were to talk of 'potential human life'. As regards abortion, one should not deny the existence of an individual and wilful act actually performed – impersonalisation may only be taken to the extreme in the legal qualification of abortion [by the legislature's not acknowledging the personal status of the foetus […]]. This is why the mother's right to self-determination may be weighted against foetal life; however, during such an assessment, one must constantly keep in mind the weight of the values constitutionally protected by the State's objective yet not absolute duty to protect life.']

[849] Grounding his dissent on the constitutional provision of human dignity in Decision 48/1998 (XI. 23.) AB, Judge Tamás Lábady essentially dealt with the range of issues raised in the *Abortion I Case.* ['I am convinced that the legislature has no constitutional empowerment to qualify, in legal terms, foetal life differently from human life, as the foetus – regardless of being inside the mother's body or in an artificial environment outside her – must, from the moment of conception, be deemed a human, i.e.

3. Analysis

Looking through the newly carved lens, I identify themes found in the three philosophically grounded accounts of the law of human dignity in the text of the *Abortion I Case* and show how this reading advances another understanding of the meaning of practicing the law of human dignity in a well-know and much-discussed FCC case.

a. Ontological

The ontological account of the law of human dignity permits the contouring of life and law as distinct realms and of the variations of the human image evidenced in the text of the *Abortion I Case*.

i. Inconsistency between life and law

The relationship of the child *en ventre sa mere* [*das Verhältnis der Leibesfrucht zur Mutter*] in life and in law surfaces in the text of the *Abortion I Case*. In law, the life developing itself in the womb of the mother is an independent legal value under Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 GG[850]. Notwithstanding the natural union between the unborn child and the mother, the unborn child is perceived as ontologically autonomous in legal life, that is, not merely as 'a part of the maternal organism'[851]. The pregnant woman is of course too the

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a subject of law, a person with legal capacity, and consequently, the foetus has a right to life against the mother as well. According to Art. 54 sec. 1 of the Constitution in the Republic of Hungary every human being has the inherent right to life and to human dignity of which no one shall be arbitrarily deprived. In thex interpretation of the Constitutional Court, the right to life and human dignity is an absolute subjective right, i.e. it cannot be restricted and reduced, since it is a fundamental right, which must be left intact by the law. Since in a biological sense, the foetus is a human, i.e. a genetically fully developed individual human being, and since the term 'inherent right to life' means – even in the terminology of international treaties ("droit inhérent à la vie", "angeborenes Recht auf Leben") – a right not gained through birth, but one "formed" together with the man, i.e. a right that originates in the existence, the humanity of the man, the lack of human dignity and having no right to life cannot be justified by the Constitution in case of a foetus not yet born. Therefore, in my opinion, the foetus as a new human life is a person, who is inviolable by the law and whose absolute right to life cannot be constitutionally restricted by the legislature with reference to the pregnant woman's right to self-determination or any other fundamental right. The foetus' right to life may only collide with the mother's right to life.']

[850] BVerfGE 39, 1 (36)

[851] BVerfGE 39, 1 (42)

bearer of the fundamental right to life and bodily integrity under Art. 2 sec. 2 sent. 1 GG.[852]

The ontological portrayal of the child *en ventre sa mere* in life is inconsistent with the ontological appreciation of the relationship in law. Law as a lens forms – and transforms – the representation of natural and social phenomena in texts as planes of practice. The FCC admitted the inconsistency between the relationship of the child *en ventre sa mere* with the mother and the ontology of that relation from the vantage point of the fundamental right to life and the law of human dignity. It also noticed the disparity between the ontological uniqueness of the relationship on the one hand, and the recognition of the intrinsic legal value of the child on the other. Practicing the fundamental right to life and the law of human dignity in the *Abortion I Case*[853] is premised on the legal fiction that unborn life exists separately from the mother. The – conceptual – separation in law contrasts with the firmness of the union in life.

> Even if the child is recognized as an intrinsic legal value, the child *en ventre* sa *mere* is united with the body and the life of the mother in the most intimate manner conceivable. Nature has already placed the protection in the direct care of the mother.[854]
> […] Without doubt, the natural connection of unborn life with that of the mother establishes an especially unique relationship, for which there is no parallel in other circumstances of life. [855]
> […] developing life itself is entrusted by nature in the first place to the protection of the mother.[856]

Pregnancy is a manifestation of human being-ness; despite the universality of the image of the state of being pregnant, the condition of pregnancy is uniquely experienced. This assertion points to the relevance of the tension between universals and particulars to all matters of close pertinence to human existence. Abortion is a strikingly multidimensional phenomenon of social life that 'raises manifold problems of biological, especially human-genetic, anthropological, medical, psychological, social, social-political, and not least of ethical and moral-theological nature, which

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[852] BVerfGE 39, 1 (25); ibid (42) ['Pregnancy belongs to the sphere of intimacy of the woman, the protection of which is constitutionally guaranteed through Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG.']
[853] BVerfGE 39, 1 (36) ['The statutory regulation in the *Fifth Statute to Reform the Penal Law* which was decided upon after extraordinarily comprehensive preparatory work can be examined by the Constitutional Court only from the view-point of whether it is compatible with the Basic Law, which is the highest valid law in the Federal Republic. [...] what is involved here is the protection of human life, one of the central values of every legal order.']
[854] BVerfGE 39, 1 (25)
[855] BVerfGE 39, 1 (42)
[856] BVerfGE 39, 1 (45)

touch upon the fundamental questions of human existence.'[857] The legislature, argued the Court, has to confront the multidimensionality of abortion and evaluate the plethora of arguments so as to, ultimately, reach a decision that reconciles law with life, in other words 'to arrive at a decision as to the manner in which the legal order should respond to this social process.'[858]

ii. The concrete imprint of unborn life on the *Menschenbild*: potentiality, continuity and the traversal of limits

Human dignity is an integral aspect of human existence, regardless of whether one is conscious of it and autarkic in maintaining it. Potentiality is an inherent quality of human being-ness that trails the 'human' in 'human dignity'.

> The potential faculties present in the human being from the beginning suffice to establish human dignity.[859]
> Human life represents, within the order of the Basic Law, an ultimate value, the particulars of which need not be established; it is the vital basis of human dignity and the prerequisite for all other fundamental rights. [860]

Human life constitutes the 'vital basis' of human dignity and enables the practice of all other fundamental rights. The Court resisted setting out the particulars of the value of human life; non-determination is attuned to the unspecified content and form of law's *Menschenbild*. The textual hook in Art. 2 sec. 2 sec. 1, 'Everyone has a right to life […]', directed the Court to set the beginning of life 'in the sense of historical existence of a human individual'[861] on the 14th day after conception (nidation, individualization). The exercise of authority over meaning manifested in the definition of the beginning of life by the Court – based, granted, indeed on valid

[857] BVerfGE 39, 1 (35f.); ibid (42f.) ['Were the embryo to be considered only as a part of the maternal organism the interruption of pregnancy would remain in the area of the private structuring of one's life, where the legislature is forbidden to encroach [cited cases omitted]. Since, however, the one about to be born is an independent human being who stands under the protection of the constitution, there is a social dimension to the interruption of pregnancy which makes it amenable to and in need of regulation by the state. The right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense and accordingly embraces the self responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection.']
[858] BVerfGE 39, 1 (36); ibid (66) In line with Rancière's observation that dissensus, through its impropriety, introduces new subjects and heterogenous objects into the field of perception, the Court noted, 'The passionate discussion of the abortion fabric of problems [*Abtreibungsproblematik*] may provide occasion for the fear that in a segment of the population the value of unborn life is no longer fully recognized.' It added, however, that this possibility gives the legislature no right to resignation.
[859] BVerfGE 39, 1 (41)
[860] BVerfGE 39, 1 (41)
[861] BVerfGE 39, 1 (37)

sources of external justification – indicates how the ontology of human being-ness is proclaimed independently in legal life. Thus, stating the limits of human being-ness in legal texts asserts the integrity of legal life as a distinct sphere of events.

> The right to life is guaranteed to everyone who 'lives'; no distinction can be made here between various stages of the life developing itself before birth, or between unborn and born life. 'Everyone' in the sense of Art. 2 sec. 2 sent. 1 GG is 'everyone living'; in other words: every life possessing human individuality; 'everyone' also includes the yet unborn human being.[862]

Coming-into-being evokes the notions of potentiality and continuity. Potentiality and continuity constitute key ontological qualities of the human being-ness of developing life as portrayed in the text of the *Abortion I Case*; accordingly, this portrayal leaves its imprint on law's *Menschenbild*. Potentiality and continuity assume 'something missing', namely a perpetual state of incompleteness on which the process of the unfolding of one's essence in coming-into-being feeds. The traversal of limits as a figurative rendering of the happening of the irruption of Being is the *modus operandi* of that process. The practice of the law of human dignity in the *Abortion I Case* is a prime example reinforcing the insight that limits crossed are not clearly sketched and spaces of verification opened up in coming-into-being not sharply demarcated. For instance, in coming-into-being the human being crosses the limits that delineate the various stages of – physical, mental and psychical – development. Consciousness as the essential trait of human personality and, according to some voices in the literature, the prerequisite for establishing human dignity, appears 'a rather long time after birth.'[863] In light of those observations the Court argued,

> In opposition to the objection that 'everyone' commonly denotes, both in everyday language as well as in legal language, a 'completed' person and that a clear grammatical interpretation

[862] BVerfGE 39, 1 (37); Still, the Court effectively differentiated between unborn and born life, stating that '[t]he legislature is not obligated, as a matter of principle, to employ the same penal measures for the protection of the unborn life as it considers required and expedient for born life.' The Court's position is understood as an insinuation of the difference in ontological signification and significance between unborn and born life, though the FCC explicitly referred only to legal history, noting that 'this was never the case in the application of penal sanctions […].' BVerfGE 39, 1 (45f.)

[863] BVerfGE 39, 1 (37); ibid ['The process of development which has begun at that point is a continuing process which exhibits no sharp demarcation and does not allow a precise division of the various steps of development of the human life. The process does not end even with birth; the phenomena of consciousness, which are specific to the human personality, for example, appear for the first time a rather long time after birth. Therefore, the protection of Art. 2 sec. 2 sent. 1 GG cannot be limited either to the 'completed' human being after birth or to the child about to be born which is independently capable of living.']

> speaks therefore against the inclusion of the unborn life within the scope of effectiveness of Art. 2 sec. 2 sent. 1 GG, it should be emphasized that, in any case, the sense and purpose of this provision of the Basic Law require that the protection of life should also be extended to the life developing itself. The security of human existence against encroachments by the state would be incomplete if it did not also embrace the prior step of 'completed life,' unborn life.[864]

Only by deeming unborn life to be encompassed in 'everyone' can the security of human existence against state encroachments be guaranteed. The FCC opposed a grammatical interpretation that denies unborn life ontologically conceived space within the scope of constitutional protection on grounds of its incompleteness. The fundamental right to life protects developing unborn life. Potentiality and continuity mirror the uninterrupted coming-into-being of human beings and, from an ontological perspective, it is plain to see that the forceful interruption of this movement would be inhumane. What requires closer scrutiny is the syllogism that led the Court to hold unconstitutional the failure to guarantee unborn life the uninterrupted unfolding of its essence. What calls for astute consideration is how the inhumane features in the text of the *Abortion I Case* and how it relates to the unconstitutional. The ontological account of human dignity permits another, hermeneutic and literary, reading of the Court's argument.

The practice of the law of human dignity and the fundamental right to life in the *Abortion I Case* is premised on the recognition of the potential residing in human existence to reveal its essence. The human being comes forth and gradually discloses its essence even during the pregnancy.[865] The lines that mark the different stages traversed in coming-into-being are indistinct and indeterminate in life; the FCC argued for embracing this insight as a decisive factor in the production of the meaning of human being-ness in law and, consequently, of the practice of the law of human dignity. The obscurity of limits is an exceptional feature of life developing itself not only prior to but also after birth. For that reason, this encroachment on human existence by the state or third parties cannot be justified on the basis of strictly specified time frames; any attempt to determine precise time frames in law would be arbitrary. In response to the question raised *supra* re the relation between the

[864] BVerfGE 39, 1 (37)
[865] The trimester solution reflects the gradual evolution of the human being in the womb of the mother.

inhumane and the unconstitutional, a first association can be based on the nexus between the arbitrary and the inhumane.

How does the arbitrary relate to the unconstitutional? While the ontological analysis only intimates their relation, themes in the phenomenological account of human dignity can help elucidate this connection. Arbitrariness implies that a single perspective or viewpoint, and the vision emanating therefrom, retains authority over meaning and totalizes meaning, leaving no room for critical reflection, namely for the process commanded by the constitutional guarantee of human dignity and premised on the infinity of language. A constitutional order founded of human dignity does not tolerate the arbitrary, because the experience of arbitrariness is tantamount to the experience of mysterious participation[866] to an imposed causality.

Coming-into-being while in the womb of the mother is not a self-determined movement. The FCC called attention to the widely disputed question 'whether the one about to be born himself is a bearer of the fundamental right, or on account of a lesser capacity to possess legal and fundamental rights, is 'only' protected in his right to life by the objective norms of the constitution […]'[867]; while noting the importance of that question, the Court abstained from deciding on the issue. The question hints at a fundamental difference between the ontological signification and significance of unborn life in the *Abortion I Case* and the ontological rendering of all other manifestations of human being-ness exhibited in the ontological analyses. State interference in all other cases amounts to a forced *polemos* that causes the irruptive disclosure of human beings, hence the impairment of the self-determined unfolding. It is the forced and – *a minore ad maius* – forceful nature of interventions in their unfolding that leaves human beings ultimately outside their own essence.

The forceful signifies the irruptive disclosure of Being that results in the revelation of the essence of human being-ness *ex negativo,* to wit precisely by displaying its negation, by portraying the inhumane, namely the distorted image of a human being outside its essence. The forced, as used here, connotes the externally determined happening of the irruption of Being[868]. The Court stressed that abortion is devastating in an all-exceptional way for unborn life; ontologically termed, it strikes human existence and irreversibly distorts the concealing-revealing process of *φύσις*.

[866] Levinas, *Totality and Infinity*, 213
[867] BVerfGE 39, 1 (41)
[868] Martin Heidegger, *Introduction to Metaphysics*, 149

In the Court's reasoning, the forceful is associated with abortion as an interruption of the unfolding of unborn life and the forced with state intervention in the sphere of self-determined decision-making of the mother.

> The duty of the state to protect every human life may therefore be directly deduced from Art. 2 sec. 2 sent. 1 GG. In addition to that, the duty also results from the explicit provision of Art. 1 sec. 1 sent. 2 GG since developing life participates in the protection which Art. 1 sec. 1 GG guarantees to human dignity.[869]

The duty of the state is comprehensive; it 'forbids not only self-evidently direct state attacks on the life developing itself but also requires the state to take a position protecting and promoting this life, that is to say, it must, above all, preserve it even against illegal attacks by others.'[870] The statement declares law's humanism, namely 'caring' and 'meditating' to the fullest extent possible that the human being is human and not inhuman.[871] The Court granted that delivering upon the duty to protect is pragmatically limited due to the ineffectiveness of penal sanctions when the mother is unwilling to carry the child to term. The threat to the life and health of the pregnant woman[872] posed by quackery or illegal interruptions of pregnancy[873], that is, measures to which the unwilling mother might resort, introduces into the equation the interests of another human being and at once points to the complexity of the relation and heightens the illustration of ineffectiveness. 'The duty to protect, therefore, cannot establish for the state a thoroughgoing duty to punish.'[874]

iii. Humanism, pragmatism, and paternalism

Amidst the tension between life and law, this ontological analysis seeks the meaning of law's humanism, how it coordinates with law's pragmatism, and how it could, or indeed sometimes does, metamorphose into paternalism in the text of the *Abortion I Case*.

The fundamental right to life is expressly incorporated into the Basic Law – in contrast to the Weimar Constitution. Explicit constitutional protection is understood as 'a reaction to the "destruction of life unworthy of life," to the "final solution" and "liquidations," which were carried out by the National Socialist Regime as state

[869] BVerfGE 39, 1 (41)
[870] BVerfGE 39, 1 (42)
[871] Heidegger, 'Letter on Humanism' 239, 244
[872] BVerfGE 39, 1 (25)
[873] BVerfGE 39, 1 (42)
[874] BVerfGE 39, 1 (25)

measures.'[875] Likewise, the 'legal condemnation of the interruption of pregnancy […] must clearly appear in the legal order existing under the constitution.'[876] The utterance of condemnation stresses 'the duty incumbent upon the legislature to protect life'[877] and facilitates the advancement of the claim of those who have no part[878] to the part reserved for them within the realm of fundamental rights in light of the law of human dignity. Legal condemnation of abortion need not be communicated by means of the threat of punishment; the only requirement ensuing from the law of human dignity and the fundamental right to life is that the chosen means clearly mirror legal condemnation and prove effective in preventing interruptions of pregnancy.[879] Emphasis on communicating certain meaning affirms the importance of the rhetorical substantiation of condemnation.

> Punishment, however, can never be an end in itself […]. The penal norm represents, to a certain extent, the 'ultimate ratio' in the armory of the legislature.[880]

With respect to the legal protection they occasion, socio-legal or civil law means are 'not fundamentally different than the enactment of a penal norm […]'[881]; the difference lies in their intensity. In an anthropocentric legal order, 'meditating and caring'[882] that the law practiced does not force human beings outside their essence calls for both an understanding of what the pursued humanism stands for and a pragmatic approach. The proportional intensity of state interference reconciles the two impetuses underlying law's practice. Humanism manifests in the guiding principle of

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[875] BVerfGE 39, 1 (36); Hufen (2004) 313, 313; See also Joseph H. H. Weiler, 'Epilogue: Europe's Dark Legacy – Reclaiming Nationalism and Patriotism' in Christian Joerges and Navraj Singh Ghaleigh (eds), *Darker Legacies of Law in Europe – The Shadow of National Socialism and Fascism over Europe and its Legal Traditions* (Oxford and Portland, Oregon: Hart Publishing, 2003) 389, 391 ['To explore and actively remember – the two are inextricably linked – is thus, not only, as Habermas teaches, about *understanding* who we are – creatures of an '… historical milieu that made us what and who we are today.' It is *constitutive* of who we are. It helps make us who we want to be.']

[876] BVerfGE 39, 1 (53)

[877] BVerfGE 39, 1 (65); ibid ['That interruptions of pregnancy are neither legally condemned nor subject to punishment is not compatible with the duty incumbent upon the legislature to protect life, if the interruptions are the result of reasons which are not recognized in the value order of the Basic Law.']

[878] Rancière, *Dissensus* (2010) 35

[879] BVerfGE 39, 1 (51) ['If the legislature wants to abstain (even in this case) from penal law punishment, this would be compatible with the requirement to protect of Art. 2 sec. 2 sent. 1 GG only on the condition that another equally effective legal sanction stands at its command which would clearly bring out the unjust character of the act (the disapproval by the legal order) and likewise prevent the interruptions of pregnancy as effectively as a penal provision.']

[880] BVerfGE 39, 1 (46f.)

[881] BVerfGE 39. 1 (47)

[882] Heidegger, 'Letter on Humanism' 239, 244

the precedence of prevention over repression ensuing from parliamentary discussions and affirmed in the Court's jurisprudence[883]. Pragmatism is evidenced, for instance, in the following empirically verified observation:

> It is generally recognized that the previous § 218 StGB, precisely because it threatened punishment without distinction for nearly all cases of the interruption of pregnancy, has, as a result, only insufficiently protected developing life. The insight that there are cases in which the penal sanction is not appropriate has finally led to the point that cases actually deserving of punishment are no longer prosecuted with the necessary vigor.[884]

The Court noted that preventive measures, such as the assistance and counseling offered to the pregnant woman in the *Fifth Statute to Reform the Penal Law*, could not adequately 'replace the individual protection of life which a penal norm fundamentally provides […]'[885]. Be that as it may, no general duty of the state to punish can be derived from the Basic Law, the opposing fundamental rights of the pregnant woman and the unborn child, or constitutional value decisions.[886]

It would be fair to argue that a very fine line distinguishes the advancement of humanism from state paternalism in the practice of law. Paternalism signifies an infringement on the self-determination of the individual human being. In the *Abortion I Case*, paternalism is evinced in the claim that a particular portrayal of the relationship of the child *en ventre sa mere* accords with the meaning of law's humanism deduced from the objective value order of the Basic Law. A further remark elucidates why this instance of transformation of perspective into being[887] – which holds true for the practice of law in general – can amount to paternalism. The Court's instructions to the pregnant woman in the *Abortion I Case* indicate that the effective transformation of perspective into being through law requires the alignment of perspective of the constitutional order on the ontology of the relationship with the child *en ventre sa mere* with the perspective of an individual human being and of

[883] BVerfGE 39, 1 (44) ['In this connection the guiding principle of the precedence of prevention over repression is also valid particularly for the protection of unborn life [cited cases omitted]. It is therefore the task of the state to employ, primarily, social, political, and welfare means for securing developing life.']
[884] BVerfGE 39, 1 (52)
[885] BVerfGE 39, 1(65)
[886] BVerfGE 39, 1(24f.)
[887] MacKinnon, *Toward a FTS* (1989) 237

society as a whole[888]. If in *ad hoc* cases these perspectives cannot be harmonized, that of the law prevails over that of the individual[889]. How harmonization is conducted is also decisive in ascertaining paternalism.

Paternalism is evident in the Court's statement that 'the primary concern is to strengthen readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life […]'[890], and that the principal goal of the undertaking to protect life by the state is 'to reawaken and, if required, to strengthen the maternal duty to protect, where it is lost […].'[891] Counseling as a preventive measure that aims at strengthening the personal responsibility of the woman compromises the integrity and ability to self-determination of the pregnant woman. The punishability of abortion 'creates a threshold [*Schwelle*] which many recoil from crossing'[892]; the didactic motivation underlying punishment is plain to see. An ontological observation can be directly inferred from reference to a threshold, namely that law 'creates' certain limits and prohibits their traversal in coming-into being and unfolding one's essence.

State paternalism corresponds to the assertion of an objective meaning of Art. 1 sec. 1 GG, which should be protected even against the legal subject and the authority of his or her subjective perspective over meaning.[893] Reactions to this impairment of self-determination center on the danger of restrictions on liberty in view of human dignity considerations[894]. However, despite the soundness of perceiving state paternalism as a phenomenon that originates in the human dignity v. liberty conflict, which is, indeed, elucidated and tempered by means of systemic constructs such as the triangle of fundamental rights[895], a further understanding can spring from the co-occurrence of totality and infinity in the practice of the law of human dignity. At this stage, the analysis calls for the employment of phenomenological insights.

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[888] Minding that law's practice is essentially interpretive practice, critical reflection is called for as regards differences in treating individual and collective interpretations. See Dworkin, *Law's Empire* (1986) 62ff. [Analogies can be drawn from the discussion about the interpretation of a social practice from the various viewpoints of individuals as members of a community on the one hand, and the interpretation of the social practice *per se* on the other.]
[889] MacKinnon, *Toward a FTS* (1989) 237
[890] BVerfGE 39, 1 (44)
[891] BVerfGE 39, 1 (45)
[892] BVerfGE 39, 1 (57)
[893] See comments on BVerwGE 64, 274 (1981) [Sittenwidrigkeit von Peep-Shows] in Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 152
[894] Enders (1997) 369
[895] Baer, 'Triangle' (2009) *University of Toronto Law Journal* 417

Asserting an objective meaning of human dignity in line with the constitutional order can result in totalizing the other[896], namely the self-determined[897] human being or, more generally, the bearer of human dignity, and in disregarding infinity as an essential aspect of human being-ness. State paternalism is, then, the consequence of an intra-conceptual inadequacy. This alternative understanding of the roots of paternalism alarms actors to critically reflect on whether, besides vision[898], language has shaped the produced human dignity meaning. Identifying the cause of the problem within the concept points, at the same time, to the plane where opportunities to resolve it could be lying. Telling a human dignity story that comprises totality and infinity, in other words adopting an affirmative stance towards the dual sense of 'something missing', sets the stage for addressing such intra-conceptual inadequacy.

iv. The portrayal of the human dignity v. human dignity conflict

Facing the human dignity v. human dignity conflict in the *Abortion I Case*, the FCC adopted a clear stance in favor of the continuation of pregnancy,[899] unless 'another interest equally worthy of protection, from the standpoint of the constitution, asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn.'[900]. An ontological portrayal ensuing from the Court's backbone argument shows that the balancing involves on the one hand the forceful destruction of human existence and the consequential interruption of its potentiality and continuity and, on the other hand, the forced, that is, the externally determined happening of the irruption of Being that contravenes the *φύσις* and causes one to be outside one's essence, featuring in the interference of the state with the self-determination of the pregnant woman in non-indicated cases of abortion.

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[896] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 152; Günter Frankenberg, 'Die Würde des Klons und die Krise des Rechts' (2000) 33 *KritJ* 325 at 332 [The human being turns from a self-determined subject to an object of 'educational-solicitous measures in the name of prevailing notions of behavior in line with dignity.']

[897] Self-determination concerns first and foremost the individual authority over the production of the meaning of human dignity. Geddert-Steinacher (1990) 89 fn 49; See also Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 112 [individual human dignity emphasized over the dignity of humanity]

[898] Levinas, *Totality and Infinity,* 16 [Introduction by John Wild]

[899] See for instance, BVerfGE 39, 1 (27) ['That the counseling must be directed to the continuation of the pregnancy is clear.']

[900] BVerfGE 39, 1 (50)

Interestingly, as the reasoning in the dissenting opinion shows, definitions of the forceful and the forced are relative; the depiction of the forced ensuing from the majority opinion corresponds apparently to what is rendered as forceful from the viewpoint of the dissenters. The *Abortion I Case*, including the dissenting opinion, presents a prime example of how varying definitions of the forced and the forceful, understood in an *a minore ad maius* relation, reflect differences in the degree of sensitization of the Court, of a particular Justice or of society to the concrete lived experience of the other.

> A compromise which guarantees the protection of the life of the one about to be born and permits the pregnant woman the freedom of abortion is not possible since the interruption of pregnancy always means the annihilation of the unborn life. […][901]

The irrevocable destruction of an existing human life led the FCC to label abortion 'an act of killing.'[902] The Court juxtaposed the phrasing of the respective section in the *Fifth Statute to Reform the Penal Law*, 'Felonies and Misdemeanors against Life', and the language in the previous penal law, 'Killing of the Child *en ventre sa mere*'[903], and further noticed that the common description 'interruption of pregnancy' cannot camouflage the fact that abortion is an act of killing.

> No legal regulation can pass over the fact that this act offends against the fundamental inviolability and indisposability of human life protected by Art. 2 sec. 2 sent. 1 GG. […] Therefore, it follows that the law cannot dispense with clearly labeling this procedure as 'unjust.' [904]

The application of the measures that stipulated the legal condemnation of abortion will often unavoidably 'touch upon the areas of freedom of other bearers of fundamental rights.'[905] The Court admitted that the right to life of the unborn 'can lead to a burdening of the woman which essentially goes beyond that normally associated with pregnancy.'[906] Due to the uniqueness of the situation of pregnancy, penal measures could prove particularly problematic. Beyond illustrating the difference between forced and forceful interference, the ontological lens cannot convey more as regards the portrayal of abortion as an act of killing; this project is

[901] BVerfGE 39, 1 (43)
[902] BVerfGE 39, 1 (46)
[903] BVerfGE 39, 1 (46)
[904] BVerfGE 39, 1 (46)
[905] BVerfGE 39, 1 (47)
[906] BVerfGE 39, 1 (48)

undertaken in the linguistic-analytical analysis of the practice of the law of human dignity in the *Abortion I Case, infra.*

v. The 'how' of the protection guaranteed by the law of human dignity: forced or, also, forceful? (Dissenting opinion)

The dissenters argued, 'the constitutional duty to protect [the life of each individual human being] also includes its preliminary stages before birth […]' [907], and moved on to clarify that discussions in Parliament and before the FCC 'dealt not with the *whether* but rather with the *how* of this protection.'[908] The role of the FCC as understood by the dissenters is to defend the subject of fundamental rights from 'excessive infringement by the state power.'[909]

> On the scale of possible infringements by the state, penal provisions are positioned at the top: they demand of a citizen a definite behavior and subdue him in the case of a violation with sensitive restrictions of freedom or with financial burdens. [...]
> In the present constitutional dispute, the inverse question is presented for the first time for examination, namely whether the state *must* punish, whether the abolition of punishment for the interruption of pregnancy in the first three months of pregnancy is compatible with fundamental rights. It is obvious, however, that the disregard of punishment is the opposite of state encroachment.[910]

Penal sanctions amount to the gravest state infringement on fundamental rights. The dissenters stressed that the partial withdrawal of penal provisions was not motivated by a stance of approval of abortion; rather, in line with law's pragmatism, the legislature sought to react to the experience of ineffectiveness of previous stricter penal measures. For those reasons, argued the dissenters, the abolition of punishment for abortions in the first three months does not amount to an attack on the unborn life by the state or, in ontological terms, does not seek to impede unfolding towards humanism. This point could be perceived as an indication of critical reflection on the – hermeneutic and literary – association of refraining from punishing and endorsing an infringement on the legal value of life. In essence, the dissenters' argument hints at the argumentative leap in the substantiation of that link.

[907] BVerfGE 39, 1 (68)
[908] BVerfGE 39, 1 (68f.)
[909] BVerfGE 39, 1 (70)
[910] BVerfGE 39, 1 (70f.)

The dissenters criticized reliance on the 'more extensive meaning of fundamental rights as *objective value decisions*'[911] in the majority opinion. Setting the objective value order as the vantage point for the ontological appreciation of human being-ness and the law of human dignity in the *Abortion I Case* can lead to static portrayals. Recourse to tools that enable critical reflection on the dogmatism lurking in the prospect of a *status quo* established by objective value decisions is undertaken *infra*. The imposition of a *status quo* alludes to the forced nature of the *polemos* that causes the unfolding of the essence of human beings thus interferes with their self-determination; penal measures, however, evoke the forceful on top of the forced. The dissenters were fundamentally concerned about the position that 'an objective value decision should function as a *duty* of the legislature to enact *penal norms*, therefore to postulate the strongest conceivable encroachment on the sphere of freedom of the citizen'.[912] The measures that purport to further humanism, according to the dissenters, threaten as such the guarantee that 'human beings be human and not inhumane'.[913]

> If the objective value decision contained in a fundamental legal norm to protect a certain legal value should suffice to derive therefrom the duty to punish, the fundamental rights could underhandedly, on the pretext of securing freedom, become the basis for an abundance of regimentations which restrict freedom. What is valid for the protection of life can also be claimed for other legal values of high rank – for example, bodily integrity [*körperliche Unversehrtheit*], freedom, marriage, and family.[914]

Interestingly, in similar fashion to the *Life Imprisonment Case* discussed *infra*, freedom considerations are associated with inviolability as the foundational aspect of the meaning of human dignity. This observation brings to mind the theorizing of the relation of human dignity to other fundamental rights. The law of human dignity is widely practiced together with other fundamental rights, rather than independently. The ontological account presently introduced does not offer language and concepts for treating other legal concepts, such as equality or liberty, featuring alongside the law of human dignity. The linguistic-analytical and phenomenological accounts

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[911] BVerfGE 39, 1 (71)
[912] BVerfGE 39, 1 (73); ibid (86f.) ['If […] judicial self-restraint has validity, the Constitutional Court a *fortiori* should not compel the legislature to employ the power of punishment […]. This certainly does not correspond to the function of penal law in a liberal social state.']
[913] Heidegger, 'Letter on Humanism' 239, 244
[914] BVerfGE 39, 1 (73)

afford hermeneutic and literary tools for approaching the interplay between the different legal concepts and their mutually restrictive, reflective and enriching practice.

vi. Dissensus: an alternative portrayal (Dissenting opinion)

The portrayal of the state of being pregnant as a manifestation of human being-ness, and, consequently, of the uniqueness of the interruption of pregnancy vis-à-vis other cases of interference with human life in the dissenting opinion essentially deviates from the understanding of pregnancy and the appreciation of abortion in the majority opinion. The dissenting opinion relocated the point of dissensus.

> Involved here is not the academic question of whether it is proper to employ the power of the state to protect against murderers and killers, who can be deterred in no other way. […][915]
> […] Where the defense against state encroachments is involved, a distinction cannot, of course, be made between prenatal and postnatal stages of development; the embryo is, insofar as it is a potential bearer of fundamental rights, to be protected without exception in the same way as each born human life. This equal treatment under the law has only limited applicability to the injury to unborn life by a third party against the will of the pregnant woman, in no way however can it be applied to the refusal of the woman to allow the child *en ventre sa mere* to become a human being.[916]

According to the dissenters, 'in the person of the pregnant woman there is a unique unity of 'actor' and 'victim' [that] is of legal significance […]'[917]. The dissenters opposed leveling the mother undergoing abortion and third parties killing unborn life apropos the legal treatment accorded with their action. Significantly, this argument was premised on the dissenters' appreciation of the unique nature of pregnancy. Emphasizing the natural and unique bond between unborn life and the pregnant woman, the dissenting opinion shifted the conception of the ontology of the relationship, ergo also of the 'how' of the legal treatment of abortion.

> Otherwise than in the case of homicide mentioned, the legislature can and must proceed, furthermore, from the idea that the object of protection – the child *en ventre* sa *mere* – is most effectively protected by the mother herself and that her willingness to carry the child *en ventre sa mere* to term can be strengthened through measures of the most varied kinds. [...] the question arises whether a

[915] BVerfGE 39, 1 (78)
[916] BVerfGE 39, 1 (79)
[917] BVerfGE 39, 1 (79)

> disturbance of this relationship, as is evident in the case of interruptions of pregnancy, can be obviated directly through a penal sanction in an appropriate manner. In any case the legislature may, because of the special circumstances mentioned, react differently here than to the killing of human life by a third party.[918]

Moreover, the dissenters clarified that the beginning of life is to be set at conception rather than implantation, and contended that the demarcating lines separating and delineating distinct stages in the development of human life are less obscure than the majority of the FCC claimed. Setting conception as the beginning of life is, according to the dissenters, attuned to focusing on the prospect of development in the case of natural fertilization of an embryo, regardless of the probability of realization of this evolution.[919] The extension of identification of human being-ness at the embryonic stage conveys a particular self-understanding of the human being from the origins of the own 'I'[920]. Empowering the embryo, from the moment of conception, with a categorical claim to human dignity spares the dubious question about the demarcating lines between stages of development and their decisiveness on whether human dignity should be protected.[921] According to some voices in the legal literature, the guarantee of the human dignity of the unborn child implies recognition of the status of a legal subject[922]; FCC jurisprudence has, however, not affirmed to date this interpretation.

The disparity between the majority opinion and the dissent on this matter, considering that, in both instances, definitions are grounded on scientific facts, highlights how, in the practice of law, being is formed – and transformed[923] – by perspective and initiated anew as being into the realm of law. In the dissenting opinion, the development of unborn life is documented apropos the lived experience of the pregnant woman, in line with the proposition that the 'growing maternal relationship corresponds to the different embryonic stages of development.'[924]. This determination of indicative stages of pregnancy is a sign of a holistic approach to the ontology of the relationship of the child *en ventre sa mere* in the dissenting opinion.

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[918] BVerfGE 39, 1 (80)
[919] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 65
[920] Spaemann, 'Über den Begriff der Menschenwürde', *Menschenrechte und Menschenwürde* (1987) 295, 303
[921] Herdegen (n 919)
[922] Geddert-Steinacher (1990) 66ff.
[923] MacKinnon, *Toward a FTS* (1989) 237
[924] BVerfGE 39, 1 (80); ibid (94) ['For the constitutional decision it matters only whether the penal provision is imperatively required to secure an effective protection of developing life, having taken into consideration the interests of the woman which are deserving of protection.']

> The fact that an independently existing living being separable from the maternal organism first exists after a lengthy process of development rather suggests or at least permits with regard to legal judgment consideration of lines of demarcation based on time, which correspond to this development. The biological continuity of the entire development until birth – the beginning of which is to be set, not at implantation, but rather at conception, if the majority view is consistently applied – does not alter the fact that a change in the attitude of the pregnant woman, in the sense of a growing maternal relationship, corresponds to the different embryonic stages of development.[925]

The dissenters juxtaposed the legal consciousness of the pregnant woman and general legal consciousness with the majority opinion. For the former, the dissenters noted, 'there is a difference between an interruption of pregnancy which takes place in the first stage of pregnancy and one which takes place in a later phase.'[926] The introduction of the two extra-legal perspectives opens up a field of dissensus fostering critical reflection on the authority of law over meaning, which can be understood as the transformation of perspective into being. The dissenters referred to the *Roe v. Wade* decision of the Supreme Court of the United States and the opting for 'a different penal assessment, tied to such stages which are based on time […]'[927]. There is not only one ontology of human being-ness and, consequently, not only one meaning of the practice of the law of human dignity. The confrontation of variant ontological portrayals sets up a stage of dissensus. As noted in the ontological account of human dignity in Chapter One, dissensus is 'a dispute over what is given and about the frame within which we see something as given […] the putting of two worlds in one and the same world.'[928] The law of human dignity as the vantage point of confrontations introduces into the practice of law versatile language that stretches across the levels – law and life – to which ontological portrayals correspond. The building of bridges renders the ontologically significant traversal of limits possible.

> It was especially significant for the legislature in deciding how best to reform these situations that the decision for an abortion generally grows out of a conflict situation based on varied motivations which are strongly imprinted with the circumstances of the individual case.[929]

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[925] BVerfGE 39, 1 (94)
[926] BVerfGE 39, 1 (81)
[927] BVerfGE 39, 1 (81)
[928] Rancière, *Dissensus* (2010) 69
[929] BVerfGE 39, 1 (83)

In line with the proposition that the answer to the question 'Who is the human being?' should be sought in the world rather than in heaven[930], the dissenters raised indicative pragmatic concerns like those expressed in the majority opinion re the consequences of illegality, such as the unavailability of modern equipment, professional assistance, and follow-up treatment.[931] At the same time, they stressed the importance of assessing 'the circumstances of the individual case', in other words of seeking and addressing the particulars of lived experience.

b. Linguistic-analytical

The linguistic-analytical portrayal of the *Abortion I Case* shows how incompatibility with the constitution can be figuratively rendered as non-subsumption under the legal language game, the value of surveyance for grounding the soundness of legal argumentation and the consideration of the viewpoints of other metaphysical subjects within the legal language game. It also looks at references to lenses other than law in the text of the decision. 'Something always missing' surfaces first in the linguistic-analytical portrayal of the *Abortion I Case*. The didactic function of legal condemnation is depicted in light of the introduced model; authority over the production of meaning is key in ascertaining whether the linguistic-analytically perceived law of human dignity has been complied with. The principle of proportionality is parallelized to the logical form, and the concept of the ordering of values is viewed as a tool of critical reflection. The dissenting opinion can be perceived as a self-reflective look at the legal language game of the majority opinion.

i. Incompatibility with the constitution as non-subsumption under a legal language game

The FCC found that the *Fifth Statute to Reform the Penal Law* did not afford unborn life the protection required by the Basic Law. The Court established the incompatibility of the statute with the law of human dignity[932] or, linguistic-analytically portrayed, its non-subsumption under the legal language game emanating

[930] Heidegger, *Introduction to Metaphysics*, 149
[931] BVerfGE 39, 1 (83)
[932] In fact the law of human dignity is cumulatively practiced along with the right to life. See BVerfGE 39, 1 (51) ['If the challenged regulation of terms of the *Fifth Statute to Reform the Penal Law* is examined according to these standards, the result is that the statute does not do justice, to the extent required, to the obligation to protect developing life effectively which is derived from Art. 2 sec. 2 sent. 1 GG, in conjunction with Art. 1 sec. 1 GG.']

from a viewpoint significantly defined by constitutional law. The question that prompted the proceeding was whether the regulation of terms introduced by the *Fifth Statute to Reform the Penal Law*, which left the termination of pregnancy during the first twelve weeks after conception under certain conditions unpunished, was consistent with the constitution. The regulation of terms signified a new approach to the legal treatment of interruptions of pregnancy in the German legal order; prior to the reform, law considered 'the killing of a child in the womb of its mother' generally a punishable act[933].

> The protection of the individual life may not be abandoned for the reason that a goal of saving other lives, in itself worthy of respect, is pursued. Every human life – the life first developing itself as well – is as such equally valuable and can not therefore be subjected to a discriminatory evaluation, no matter how shaded, or indeed to a balancing on the basis of statistics.[934]

The Court turned to the draft of the *Fifth Statute to the Reform the Penal Law*, which 'adhered to the fundamental punishability of the interruption of pregnancy'[935]. In the draft, the Federal Government had stressed that 'human life even before birth is a legal value which is worthy of protection and requires protection'[936]; that the Basic Law furthers a specific value decision for life in Art. 1 GG and Art. 2 sec. 2 GG, namely 'the principle of the legal inviolability of developing life'; and that, at the same time, a balance must be struck 'between the right of the unborn child and the human dignity of the pregnant woman as well as her right to the free development of her personality'[937]. According to the argumentation of the Federal Government as it appears in the Court's legal language game 'an absolute precedence cannot be granted to the one right or to the other'[938] and in conflict situations the solutions should 'take into account the value judgment of the constitution.'[939]

ii. Surveyance as the basis of soundness: 'total consideration' and portrayal of other viewpoints within the legal language game

Faced with the difficulties of surveying and deciding on the highly controversial

[933] BVerfGE 39, 1 (6)
[934] BVerfGE 39, 1 (59)
[935] BVerfGE 39, 1 (12)
[936] BVerfGE 39, 1 (12)
[937] BVerfGE 39, 1 (12)
[938] BVerfGE 39, 1 (12)
[939] BVerfGE 39, 1 (13)

matters in the *Abortion I Case,* namely the constitutionality of penalization and the human dignity v. human dignity conflict, the Court outlined the prongs of a 'total consideration'[940] of the issue: 'the worth of the injured legal value and the extent of the social harm of the injurious act – in comparison with other acts which socio-ethically are perhaps similarly assessed and which are subject to punishment'[941]; 'the traditional legal regulation of this area of life as well as the development of concepts of the role of the penal law in modern society'[942]; and 'the practical effectiveness of penal sanctions and the possibility of their replacement through other legal sanctions.'[943] In other words, the crucial considerations are first, the rank of the injured legal value in a hierarchy of values along with the relative social harm brought about, second, the history of legal regulation of this area of life, and third, the practical effectiveness of the selected measures. The first can be paralleled to the notion of hierarchy in the *Tractatus Logico-Philosophicus*[944], the second is telling of the content of the legal language game, and the third intimates the conciliation of law's humanism and pragmatism.

The FCC sought to incorporate diverse and opposing approaches into the legal language game, that is, to demonstrate surveyance of the range of arguments, in other words a broad field of sight[945], and to fortify the argumentative soundness of propositions employed in the legal language game of the *Abortion I Case* through reference to pragmatic considerations sparked by empirical insights. For that, the Court

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[940] BVerfGE 39, 1 (45)
[941] BVerfGE 39, 1 (45)
[942] BVerfGE 39, 1 (45)
[943] BVerfGE 39, 1 (45)
[944] Wittgenstein, *Tractatus,* (5.556)
[945] For instance, the legal language game encompasses the analysis of pragmatic considerations offering grounds against penal sanctions and for the regulation of terms: BVerfGE 39, 1 (56f.) ['The objection against this is that women not subject to influence understand best from experience how to avoid punishment so that the penal sanction is often ineffective. Furthermore, the legislature is confronted with the dilemma that preventive counseling and repressive threat of punishment in their life protecting effect are necessarily partially exclusive: the penal sanction of the indication solution would, in truth, through its deterrent effect prevent unmotivated interruptions of pregnancy to an extent not exactly ascertainable. At the same time, according to this objection, the threat of punishment, by discouraging counseling of women susceptible of influence, impedes saving life *in* other cases because it is precisely women in whose cases the prerequisites of an indication are absent and, beyond that, also those who do not trust the result of a procedure to determine an indication who will, in the face of the penal threat, carefully keep the pregnancy secret and who to a large extent withdraw themselves from helpful influence available through counseling centers and surroundings. On the basis of such an analysis, there could not be a defense of unborn life, which was free of gaps. The legislature, so this objection continues, would have no other choice than to weigh off life against life, namely the life which through a definite regulation of the abortion question could probably be saved against the life which would probably be sacrificed on account of the same regulation, since the penal sanction would not only protect but at the same time destroy unborn life. Thus, since no solution would unequivocally better serve the protection of the individual life, the legislature would not have transgressed its constitutionally drawn boundaries with the regulation of terms.']

turned to and reflected on the viewpoint of other eyes. The representation of various and, often, conflicting viewpoints in the text of the decision reinforces the soundness of the Court's argument in at least two ways.

The first is processual: the confrontation and interplay between (legal) language games within the legal language game of the *Abortion I Case* substantiates that they are subsumed under the field of sight of the Court as the critical eye. It can hence be logically assumed that the Court's field of sight emanates from a viewpoint outside the represented viewpoints; elementally, namely from a linguistic-analytical perspective, therein lies the ultimate authority of the constitutional judge over the meaning produced. At the same time, viewpoints represented within the legal language game of the constitutional judge are to a considerable extent premised on assumptions. Circularly, critical reflection sets off from the question whether portrayals of the unborn child and the pregnant woman are based on sound assumptions.

The second way is substantive: opening up an area of dissensus within the legal language game and welcoming other viewpoints into affirms of the analogy between the metaphysical subject and the human factor wherever it is traced, that is, not only on the face of individual human beings but also within institutions. The demonstration of dissensus strengthens the argumentative soundness of the decision and, what is more, conveys commitment to openness.

> The acknowledgment of inconsistency and tension, the openness to ambiguity and uncertainty […] define the individual mind as aware of its limits and in need of instruction, from the past and from others, and as tentative in its own claims to assurance and to vision. It makes the speaker doubt the adequacy of any language, and seek to be aware of the limits of her own forms of thought and understanding. In committing to an acknowledgment of the various ways in which […] claims [can be] made, and values characterized, it commits her to what can be called 'many-voicedness': it is profoundly against monotonal thought and speech, against the single voice, the single aspect of the self or culture dominating the rest. In forcing us to the limits of expression and of our minds, it is a commitment to openness, to the recognition of mystery, to the value of what no one has yet found the words to say or to do. [946]

The concretization of law's *Menschenbild* in the *Abortion I Case* portrays the one about to be born as 'an independent human being [*selbständiges menschliches Wesen*] who stands under the protection of the constitution'[947]. On those grounds, the

[946] White, *Heracle's Bow* (1985) 124
[947] BVerfGE 39, 1 (42)

FCC identified 'a social dimension to the interruption of pregnancy, which makes it amenable to and in need of regulation by the state.'[948]. The state has the duty to individually protect each single concrete life[949]. In linguistic-analytical terms, each individual constitutes a metaphysical subject; hence, the protection afforded to individuals as human beings should take into account their unique viewpoint on the world as their world. Recognition and protection of the rights of the pregnant woman as a concretization of law's *Menschenbild* can also be linguistic-analytically represented by the incorporation of her – assumed – viewpoint into the Court's legal language game. The Court expressed the commitment to treat the viewpoints of human beings involved separately in line with the principle developed in FCC jurisprudence 'that the unconstitutionality of a statutory provision, which in its structure and actual effect prejudices a definite circle of persons, may not be refuted with the showing that this provision or other regulations of the statute favor another circle of persons.'[950] The Court furthermore noted that this principle holds particularly 'for the highest personal legal value, "life".'[951]

Experience – as documented by the Government – shows that the percentage of interruptions of pregnancy during the first twelve weeks is exceptionally high, thus causing the statutory provision to effectively recede into the background.[952] The viewpoint of the pregnant woman is assumed[953]: '[a] – formal – statutory disapproval of the interruption of pregnancy would […] not suffice because a woman determined upon abortion would disregard it.'[954] The FCC reacted to the counseling system proposed in the new statute, noting that complete repeal of punishability occasions a gap in the protection of unborn life, thus interferes with its security 'in a not insignificant number of cases' because it '[hands] this life over to the completely unrestricted power of disposition of the woman.' In line with law's pragmatism, the FCC added, '[t]here are

[948] BVerfGE 39, 1 (42)
[949] BVerfGE 39, 1 (58)
[950] BVerfGE 39, 1 (58f.)
[951] BVerfGE 39, 1 (59)
[952] BVerfGE 39, 1 (53)
[953] The central question in critically reflecting on assumed viewpoints is whether they are soundly assumed. On assumed viewpoints and their validity see MacKinnon, *Are Women Human?* (2006) 57 ['When something happens to women, it happens in social reality. The perspective from women's point of view does not mean that women's reality can only be seen from there, hence is inaccessible to anyone else and can't be talked about and does not exist. Rather, what can be seen from the point of view of the subordination of women has been there all along – too long. We wish it didn't exist, but it can't be wished out of existence. Anyone can see it. It can be found. It can be ascertained. It can even be measured sometimes. It can be discussed. Before us, it has been missed, overlooked, made invisible.']
[954] BVerfGE 39, 1 (55)

many women who have previously decided upon an interruption of pregnancy without having a reason which is worthy of esteem within the value order of the constitution and who do not have access to a counseling such as § 218c sec. 1 StGB proposes.'[955] It noticed that 'a sufficient basis is lacking for the conclusion that the number of interruptions of pregnancy in the future will be significantly less than with the previous statutory regulation.'[956]

iii. Lenses other than law and the Basic Law

The Court constructively enriched the sources of material and, consequently, the language imported into the legal language game. The sources of material surveyed in the Court's legal language game do not submit to disciplinary dividing lines. The history of the origin of Art. 2 sec. 2 sent. 1 GG conveys clearly 'that one need not proceed to the defense of unborn life with compulsory and uniform penalization'[957]. A literary approach to the word 'compulsory' intimates the forced and the forceful as traits of penal measures and recalls the concept of *polemos* discussed in the ontological account of human dignity. Uniformity implies the establishment of a totality as thoroughly examined in the phenomenological analysis (*infra*); from a linguistic-analytical perspective it suffices to trace the presence of such language in the legal language game. The FCC engaged in sociological observations re 'the large number of interruptions of pregnancy not performed by physicians' which renders the 'protection of the life and the health of pregnant women'[958] urgent, and the insufficient protection of developing life resulting from instituting the threat of punishment 'without distinction for nearly all cases of the interruption of pregnancy'.[959]

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[955] BVerfGE 39, 1 (55f.); ibid (53f.) On the *de facto* ineffectiveness of the penal sanction the Court noted: '[…] women not subject to influence understand best from experience how to avoid punishment so that the penal sanction is often ineffective.'
[956] BVerfGE 39, 1 (59)
[957] BVerfGE 39, 1 (24)
[958] BVerfGE 39, 1 (25)
[959] BVerfGE 39, 1 (52); ibid ['The insight that there are cases in which the penal sanction is not appropriate has finally led to the point that cases actually deserving of punishment are no longer prosecuted with the necessary vigor. In addition, with respect to this offense, there is, in the nature of the case, the frequently difficult clarification of the factual situation. Certainly, the statistics on the incidence of illegal abortion (*Dunkelziffer*: unreported cases) differ greatly and it may hardly be possible to ascertain reliable data on this point through empirical investigations. In any case, the number of the illegal interruptions of pregnancy in the Federal Republic was high. The existence of a general penal norm may have contributed to that, since the state had neglected to employ other adequate measures for the protection of developing life.']

The text of the *Abortion I Case* conveys the Court's interest in comparative insights. Comparative relevance enhances the soundness of justification of the language used and the meaning produced in the Court's legal language game. Those defending the *Fifth Statute to Reform the Penal Law* argue, noted the Court, 'that in other democratic countries of the Western World in recent times the penal provisions regulating the interruption of pregnancy have been "liberalized" or "modernized" in a similar or an even more extensive fashion […].'[960] Still, the FCC clarified, the correspondence of the new regulation to the 'general development of theories [*Anschauungen*] in this area' and to 'fundamental socio-ethical and legal principles […]'[961] was not critical in deciding on the *Abortion I Case*.

> Disregarding the fact that all of these foreign laws in their respective countries are sharply controverted, the legal standards which are applicable there for the acts of the legislature are essentially different from those of the Federal Republic of Germany.[962]

Looking at the percentage of abortions in Germany, Dreier notes that worldwide the percentage number is even higher[963] and discerns two possibilities: either the unconstitutionality of the valid law on the interruption of pregnancy or the strict statutory regulations through constitutional law and the human dignity norm are not necessarily required.[964] Dreier notes the exceptional character of the constitutional treatment of abortion in Germany apropos international legal documents and the legislation in other democratic constitutional states and argues that this comparative insight, rather than precipitating demand for change, urges an understanding of such regulations less as constitutionally commanded implications of the human dignity clause, and more as decisions of the lawmaker in light of democratic principles. [965]

The historical context of the Basic Law accounts for the structural principles of the Federal Republic of Germany. The 'historical experience' of National Socialism[966], and the 'spiritual-moral confrontation' with that system formatively influence the signification and significance of the Basic Law as the lens through

[960] BVerfGE 39, 1 (66)
[961] BVerfGE 39, 1 (66)
[962] BVerfGE 39, 1 (66)
[963] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 86
[964] ibid
[965] ibid
[966] Hufen (2004) 313, 313

which legal actors within the German constitutional order produce meaning[967]. At the same time, resort to historical experience indicates that insights derived from looking at the world through another lens inform the viewpoint of the judge and constitute aspects of the produced meaning.

> In opposition to the omnipotence of the totalitarian state which claimed for itself limitless dominion over all areas of social life and which, in the prosecution of its goals of state, consideration for the life of the individual fundamentally meant nothing, the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and his dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced [cited decisions omitted], that human beings possess an inherent worth as individuals in the order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially 'worthless,' and which therefore excludes the destruction of such life without legally justifiable grounds.[968]

The *supra* excerpt associates the legal concept of human dignity with the right to life. Human dignity, 'the inherent worth' of human beings as individuals, 'demands' the unconditional guarantee of human life. Nevertheless, life can be infringed on when 'legally justifiable grounds' exist; the right to life is not absolute. In practicing the fundamental right to life, evaluations formative of concrete manifestations of the *Menschenbild,* for instance of the image of the 'apparently socially "worthless"' human being, only leave an imprint on law's *Menschenbild*.

The FCC as the decisive eye is 'charged by the constitution with surveying the observance of its fundamental principles by all organs of the state and, if necessary, with giving them effect […]'. The judge as a human being and a representative of the respective institution is expected to orient decisions 'only on those principles to the development of which this Court has decisively contributed its judicial utterances.'[969]. Judicial practice generates a doctrinal legacy that should be respected, surveyed and taken into account in the construction of the legal language game. The Court contextualized the signification and significance of the *pouvoir constituant*, noting that the ethics manifested in constitutional propositions and jurisprudence are contingent on 'experiences with a system of injustice'[970], historical development,

[967] BVerfGE 39, 1 (67); Schnapp (1989) 1, 1
[968] BVerfGE 39, 1 (67)
[969] BVerfGE 39, 1 (67)
[970] BVerfGE 39, 1 (67)

'political conditions and fundamental views of the philosophy of state'[971] and, hence, need not appear as manifestations of law's meta-dimension in other legal orders.

The National Socialist Regime resulted in an omnipotent totalitarian state; its viewpoint dominated limitlessly all other viewpoints, in other words imposed the world portrayed through the lens of National Socialism on metaphysical subjects denying them their unique viewpoint and the world ensuing from it, their world[972]. The life of the individual 'fundamentally meant nothing'. Reaction to totalitarian state structures is inherent to 'an order bound together by values', specifically values encapsulating humanism, precisely because commitment to practicing the ethical within and through law elementally enables practicing law's meta-dimension. The values of the constitutional order allude to the meta-dimension of law on account of the parallel that can be drawn between the notion of value and the transcendental character of ethics in the *Tractatus Logico-Philosophicus*.[973] This order centers on human beings and their dignity in sharp contrast to the limitless totalitarian state; the order of the Basic Law is not limitless. This is how the preambular reference to 'God' in the Basic Law is interpreted in the present analysis.

iv. 'Something always missing' and the law of human dignity

Why and how is 'something always missing' the meaning of law's meta-dimension? Affirmation of law's ethical dimension or meta-dimension, regardless of whether particular ethics are identified and uttered, that is, 'said' rather than just 'shown', amounts to the portrayal of the democratic constitutional state as a limited entity by analogy with metaphysical subjects. What can limit must stand outside and beyond what it limits. The preambular reference to 'God', the transcendental as an aspect of the law of human dignity and the doctrinal appreciation of the *Menschenbild* of the Basic Law are *topoi* of manifestation of the meta-dimension of law conceived as 'something always missing'. The notion of the limit marks our separation from 'God', understood as 'something always missing', which at once indicates the humanism of all human beings existing at the limit, and so thus limited in the same way. On the grounds of this understanding, this analysis takes on a limit-related approach to the meta-dimension.

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[971] BVerfGE 39, 1 (67f.)
[972] Hufen (2004) 313, 313
[973] Wittgenstein, *Tractatus* (6.42)

The constitutional decision to guarantee human dignity and life is the critical structural element of the meaning of the entire legal order. All expressions of state power are bound by this constitutional decision, and other socio-political and pragmatic considerations 'cannot override this constitutional limitation'. With respect to the issue of abortion, '[e]ven a general change of the viewpoints dominant in the population on this subject if such change could be established at all would change nothing.' This position reaffirms the rigidness of the boundaries of legal language games emanating from an eye that looks through the lens of an absolute law and portrays the interplay between the broader field of sight and the legal language game in the *Abortion I Case*. Absolute law as the critical lens for perceiving the world and producing meaning at first glance deauthorizes the viewpoints of metaphysical subjects wherever they appear in the portrayed legal language game – the viewpoints of the judge at the limit by analogy with the eye and of the human beings involved in any given case. However, upon closer examination, if we understand the dual sense of 'something missing' to be a crucial aspect of the meaning of the absolute law of human dignity the diverse perspectives of metaphysical subjects are, conversely, accommodated within law.

What are the implications of the constitutional character of the limitation? Does the constitutional shell of the limitation interfere with the practice of law's meta-dimension in the sense that what can only be 'shown' and not 'said' is 'said'? The propositions that communicate the meaning of these values are according to linguistic-analytical insights nonsensical. The ethical basis of 'constitutional limitation' denotes law's meta-dimension. This proposition could either be an oxymoron or, by analogy with Wittgenstein's ladder metaphor, the utterance of what can only be 'shown' in order to elucidated its senselessness after we have 'climbed out through […], on […], over […]'[974] it.

v. Penalization of abortion: implications of the didactic function of legal condemnation

The issue of the constitutionality of penalizing abortion arises early on in the course of the Court's argument.

[974] Wittgenstein, *Tractatus,* (6.54)

> The guarantee of constitutional value decisions through penal sanctions is not required in every instance in which such a decision is present. A thoroughgoing parallel of the ordering of values in constitutional and penal law cannot be created; the two realms are not identical.[975]

Law as the lens before the eye determines the eye's viewpoint. The discussion about the penalization of abortion intimates how the different fields of law correspond to different curves carved on the lens before the eye and, consequently, prompt the production of varying understandings of the world and of human beings as metaphysical subjects within it. Of course, metaphysical subjects within the totality of the legal language game are in principle, descriptively and prescriptively, identified with the limit. This presents a paradox: how can the limit be subsumed under the totality of 'what is there', before the eye? The limit is an inviolable, an '*unantastbar*' place; paternalism lurks in the appeal to the inviolability of a position, the limit as the *locus* where metaphysical subjects are found, rather than the inviolability of the human being, namely the metaphysical subject identified with the limit, as in the *Dwarf-throwing Case*[976]. The linguistic-analytical model brings to our attention the portrayal of the subsumption of human beings as metaphysical subjects under the legal language game corresponding to the text of the *Abortion I Case*. How is the inviolability respected and protected at the level of language, minding that metaphysical subjects become part of the world extending before the eye of legal actors? Phenomenological insights, such as absolute separation and non-mediation[977] or mediation that does not destroy the distance between the eye and the metaphysical subject or the self and the other, are called for to enhance the linguistic analytical account.

The Court explicitly defined the lens before the judge's eye in deciding on the *Abortion I Case.*

> […] The statutory regulation in the *Fifth Statute to Reform the Penal Law* which was decided upon after extraordinarily comprehensive preparatory work can be examined by the Constitutional Court only from the viewpoint of whether it is compatible with the Basic Law, which is the highest valid law in the Federal Republic.[978]

The criterion for determining the appropriateness of measures employed is, as

[975] BVerfGE 39, 1 (26)
[976] UN Human Rights Committee Communication No. 854/1999
[977] Levinas, *Totality and Infinity*, 52
[978] BVerfGE 39, 1 (36)

the Court noted, the effectiveness of protection of the fetus. What can be inferred from the constitution, specifically from Art. 2 sec. 2 sent. 1 GG, is the duty of the general legal order [*allgemeinen Rechtsordnung*] to guarantee 'appropriate and effective protection of unborn life […]'[979], and of the legislature in particular to be mindful of 'the guiding principles and impulses emanating from a constitutionally fundamental decision.'[980] Resorting to the authority of legislative history the Court noticed the lack of evidence therein 'for answering the question whether unborn life must be protected by the penal law.'[981]

The question whether the duty of the state to protect unborn life requires the employment of penal law measures, considering that penal law is 'the sharpest weapon' at the disposal of the state, 'cannot be answered by the simplified posing of the question whether the state must punish certain acts.'[982] Penal law protects, according to the Court, 'the elementary values of community life'[983]. The life of the human being is 'among the most important legal values'[984]. Abortion 'irrevocably destroys an existing human life', hence amounts to 'an act of killing'[985]. The FCC criticized the post-reform language of the section comprising the contested penal sanction.

> […] this is most clearly shown by the fact that the relevant penal sanction – even in the *Fifth Statute to Reform the Penal Law* – is contained in the section 'Felonies and Misdemeanors against Life' and, in the previous penal law, was designated the 'Killing of the Child *en ventre* sa *mere.*' The description now common, 'interruption of pregnancy,' cannot camouflage this fact. [986]

The FCC implied the influence that varying phrasings of the statute under scrutiny exert on meaning – understood here primarily as significance – and warned about such rhetorical implications. More neutral and less bold language might camouflage the fact that 'abortion is an act of killing'. In support of the assertion that abortion is an act of killing, which has the justificatory force of a fact in the Court's legal argumentation, the judge resorted to the language practiced in other legal language games, specifically in positive law. The main concern was the branding of abortion in law as an unjust act; law 'cannot dispense with clearly labeling this procedure as

[979] BVerfGE 39, 1 (26)
[980] BVerfGE 39, 1 (26)
[981] BVerfGE 39, 1 (40)
[982] BVerfGE 39, 1 (45)
[983] BVerfGE 39, 1 (46)
[984] BVerfGE 39, 1 (46)
[985] BVerfGE 39, 1 (46)
[986] BVerfGE 39, 1 (46)

"unjust"' [987].

> [...] the employment of penal law for the punishment of 'acts of abortion' is to be seen as legitimate without a doubt; it is valid law in most cultural states under prerequisites of various kinds – and especially corresponds to the German legal tradition. [988]

The legal condemnation of abortion is constitutionally required and must, additionally, clearly appear 'in the legal order existing under the constitution'[989]; from a linguistic-analytical perspective, legal language games extending from an eye looking through the lens of constitutional law and occupied with the subject matter should contain propositions expressing the disapproval of abortion. Such disapproval was not expressed in the provisions of the statute under scrutiny, argued the FCC, since it was left unclear 'whether an interruption of pregnancy which is not "indicated" is legal or illegal after the repeal of the criminal penalty through § 218a StGB[990]. The Court deferred to another viewpoint, namely that of 'the unbiased reader of the statute'[991], in support of its argument. Penalization constitutes the clearest possible declaration of legal condemnation. An unbiased reader would have the impression, in the Court's view, that § 218a StGB 'completely removes, through the absolute repeal of punishability, the legal condemnation – without consideration of the reasons – and legally allows the interruption of pregnancy under the prerequisites listed therein.' [992] What does the text 'say', in line with the Gadamerian hermeneutic strand presently drawn upon, the reader?

> The picture that results is of a nearly complete decriminalization of the interruption of pregnancy […].[993]

Emphasis on the picture of 'nearly complete decriminalization' ensuing from the statutory reform, besides affirming the necessity of methodological insistence on portrayals and offering impetus to refine our tools to those ends in view of the apparent significance of the pictures and images reproduced in practicing the law, suggests the Court's concern re the impact of pictorial rendering on the shaping of legal

[987] BVerfGE 39, 1 (45)
[988] BVerfGE 39, 1 (45)
[989] BVerfGE 39, 1 (53)
[990] BVerfGE 39, 1 (53)
[991] BVerfGE 39, 1 (53)
[992] BVerfGE 39, 1 (53)
[993] BVerfGE 39, 1 (53)

consciousness[994]. The Court acknowledges the force of pictures, irrespective of whether they reflect actual facts, to influence the legal consciousness of human beings involved in this case, but also of society as a whole. The existence of an order of values is as important as 'the observable reaction in an individual case', because it enhances 'the long-range effect of a penal norm which in its principal normative content ("abortion is punishable") has existed for a very long time.'[995] On the other side of the coin, concerns about the receptivity of the meaning produced by the Court in the *Abortion I Case* imply a didactic stance and could constitute a prelude to paternalism.

> No doubt, the mere existence of such a penal sanction has influence on the conceptions of value and the manner of behavior of the populace (cf. the report of the Special Committee for the Penal Law Reform, Federal Parliamentary Press, 7/1981 new p. 10). The consciousness of legal consequences which follows from its transgression creates a threshold which many recoil from crossing. An opposite effect will result if, through a general repeal of punishability, even doubtlessly punishable behavior is declared to be legally free from objection. This must confuse the concepts of 'right' and 'wrong,' dominant in the populace. The purely theoretical announcement that the interruption of pregnancy is 'tolerated,' but not 'approved,' must remain without effect as long as no legal sanction is recognizable which clearly segregates the justified cases of abortion from the reprehensible. If the threat of punishment disappears in its entirety, the impression will arise of necessity in the consciousness of the citizens of the state that in all cases the interruption of pregnancy is legally allowed and, therefore, even from a socio-ethical point of view, is no longer to be disapproved. The 'dangerous inference of moral permissibility from a legal absence of sanction' (Engisch, In the Quest for Justice, M 1971, p. 104) is too near not to be drawn by a large number of those subject to the law.[996]

The FCC, the eye in Wittgenstein's simile, is occupied with subsuming other viewpoints under the produced legal language game, to ensure that these are in accord with 'the conceptions of value', 'the concepts of 'right' and 'wrong'', more generally,

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[994]See 'Legal Culture and Legal Consciousness', *International Encyclopedia of Social and Behavioral Sciences* (New York: Elsevier, Pergamon Press, 2001); online www.iesbs.com 8623ff. ['[…] legal *consciousness* usually refers to micro level social action, specifically the ways in which individuals interpret and mobilize legal meanings and signs. […] If research on legal culture focuses attention on the myriad ways in which law exists within society generally, the study of legal consciousness traces the ways in which law is experienced and interpreted by specific individuals as they engage, avoid, or resist the law and legal meanings.']; Stürner, who, in discussing the *'Kind als Schaden'* problem notes how this conception is socio-politically the false signal and states: 'Gesteigerte Fürsorge für solche Menschen darf nicht entscheidend vom Mißglücken ihrer Verhinderung abhängen. Verfassungskonkretisierung in diesem Bereich ist eine hohe rechtskulturelle Aufgabe des *BVerfG*.' In Stürner (1998) 317, 330

[995] BVerfGE 39, 1 (57)

[996] BVerfGE 39, 1 (57f.)

with what is morally permissible 'from a socio-ethical point of view'[997]. Penal sanctions, due to the gravity of their legal consequences, create, as the Court put it, a threshold 'which many recoil from crossing', in other words, cause the boundaries of the legal language game to be exceptionally rigid and stiff. This threshold can be attributed to the indirect molding of legal consciousness, rather than an act of direct state force. The citizens of the state are led, in ontological terms, to refrain from traversing the limit set by law in view of the resultant strict legal consequences or, in linguistic-analytical terms, to produce meaning from a viewpoint decisively and profoundly attuned to a viewpoint formed by the dominant moral law as the lens attached to the eye of the responsible state actors.

Penal sanctions have compelling rhetorical force; they prohibit the inference of moral permissibility. The alleged danger of presumption of moral permissibility in the absence of legal sanctions is reported in legal scholarship as ensues from the reference in the *supra* excerpt. In drawing on legal literature to support the justificatory basis of its argument the Court demonstrated surveyance of the scholarly discourse. Relying on the report of the Special Committee for the Penal Law Reform, the FCC asserted the impact of merely the fact of penalization on the legal consciousness of the populace. Important linguistic-analytical remarks spring from the above arguments. Penal sanctions are understood as a means to the shaping of certain ethics among the populace. The legal consequences of penal sanctions reduce the likelihood of confusion about 'right' and 'wrong', and about the distinction between 'justified' and 'reprehensible' actions. This polarization indicates the rigidity of the boundaries of legal language games ensuing from an outlook on the field of sight through the lens of penal provisions. The Court's didactic stance is plain to see. The conceptions of value and the manner of behavior of citizens should adhere to the moral law.

The practice of penal sanctions consists elementally in the expression of the moral condemnation of abortion in linguistic propositions. Citizens become conscious of the fact of penalization and, mindful of its legal consequences, shape their viewpoint and

[997] Moral permissibility in accordance with the values dominant among the populace is not critical in view of self-determination of the individual human being as guaranteed by the law of human dignity. Rather, what is at stake in the *Abortion I Case* is that a third party, that is, the unborn child is affected by the interruption of pregnancy decided and performed in free will by the pregnant woman. See Köhne (2004) 285, 287 ['Dem Versuch, (angeblich) anerkannte Wertvorstellungen der Gesellschaft über das freie Individuum zu stellen, steht der Grundgedanke des GG, dass der einzelne Mensch in seiner Bedeutung über allem steht, entgegen. Eine 'abstrakte Menschenwürde', die das freiwillige – keinen Dritten schädigende – Verhalten von Menschen einschränkt, ist mit dem Menschenbild des GG nicht in Einklang zu bringen und deswegen abzulehnen.']

actions accordingly. This new insight is of utmost importance; it leads to an advancement of the ontological observation that perspective transforms being[998]. Circularly, being originates in a particular perspective declares its presence in the world, hence can be surveyed. Reflexively, being influences the formation of perspective. Minding that the ethical presents itself at the limit of the world, that is, precisely where the metaphysical subject is located in the linguistic-analytical model, the assumption of certain dominant ethics among the general populace and the identification, by means of penal sanctions, of the morally permissible compose the portrayal of the didactic stance of the Court in the *Abortion I Case,* ensuing from the reflexive coexistence of the lens of moral law representing the ethical in a given order and viewpoints of metaphysical subjects linguistic-analytically subsumed under the field of sight. The assumption of dominant ethics shared by the general populace begs for sound justificatory grounds.

Another instantiation of the Court's didactic stance surfaces in the discussion about the role of counseling centers. The FCC noted that the statutory instruction about available public or private assistance 'could be interpreted to mean that the counseling centers should only inform, without exerting influence directed to the motivational process.'[999]. The Court argued – portraying at once the assumed viewpoint of physicians entrusted with instruction about assistance to pregnant women, mothers, and children – that '[s]ocial law and social reality are […] very difficult for the technically trained person to comprehend […]'[1000], and that, according to documented experiences in England, 'an influence by the physician on the pregnant woman for the continuation of the pregnancy is highly improbable.'[1001]

> The passionate discussion of the abortion fabric of problems [*Problematik*] may provide occasion for the fear that in a segment of the population the value of unborn life is no longer fully recognized. This, however, does not give the legislature a right to resignation. It rather must make a sincere effort through a differentiation of the penal sanction to achieve a more effective protection of life and formulate a regulation which will be supported by the general legal consciousness. [1002]

The *supra* excerpt is illustrative of the interplay between the practice of law, portrayed as a legal language game, and life. The FCC expressed concern, specifically

[998] MacKinnon, *Toward a FTS* (1989) 237
[999] BVerfGE 39, 1 (61)
[1000] BVerfGE 39, 1 (62)
[1001] BVerfGE 39, 1 (62)
[1002] BVerfGE 39, 1 (66)

'fear', about the actuality of the full recognition of the value of unborn life in a segment of the population, and insisted on the reworking of the penal sanction by the legislature towards the more effective protection of life and the correspondence, to the highest degree possible, between the regulation and general legal consciousness. The reflexive process[1003] of the influence of perception, the eye's viewpoint, on being and, vice versa, of being on perception is discernible in the above portrayal.

Penal law protects the elementary values of community life. 'Punishment, however, can never be an end in itself.'[1004] In other words, penal law constitutes just means to ends other than its own practice. The law of human dignity guarantees, in light of its Kantian philosophical foundations, respect for and protection of human beings as ends in themselves. The *telos* of practicing law is the human being and his or her worth, and this ensures that law be humane and not inhumane. The legislature, in the Court's view, in deciding on the employment of penal law, has the latitude to express 'the legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment.'[1005] From a linguistic-analytical perspective, a parenthetical, yet interesting, observation is that the FCC as an eye looking through the lens of constitutional law engages in defining and delimiting another legal actor's legal language game, that is, another eye's viewpoint and field of sight[1006].

vi. The principle of proportionality and the logical form

Humanism meets pragmatism in the *ad hoc* decision on measures that effectively secure the actual protection of unborn life and reflect the importance of the legal value *enjeu.* The constitutionality of practicing penal law depends on compliance with the principle of proportionality, another concept that embodies the meta-dimension of law. As a principle of the rule of law, 'which prevails for the whole of the public law, including constitutional law'[1007], the principle of proportionality compels the legislature 'to use this [penal law] means only cautiously and with restraint.'[1008] The principle of proportionality, precisely on account of its relation to the rule of law, expresses the

[1003] Baer, *Rechtssoziologie* (2011) 12; See also Susanne Baer, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle and intersubjektive Kompetenz' (2004) 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Max-Planck-Institut) 735
[1004] BVerfGE 39, 1 (46)
[1005] BVerfGE 39, 1 (46)
[1006] Schnapp (1989) 1, 8
[1007] BVerfGE 39, 1 (47)
[1008] BVerfGE 39, 1 (47)

logical form 'shown' in the world as postulated by Wittgenstein[1009]. Precisely because the logical form can be 'shown' and cannot be 'said'[1010], the language and meaning of the principle of proportionality presents a certain impropriety, constitutes a ladder-term, a surplus-concept that articulates the ineffable as nonsensical. At the same time, the normative character of the principle of proportionality demands that the logical form be 'shown' in propositions delivering the produced meaning in legal language games.[1011]

> On the other hand, the objection that a state duty to punish can never be deduced from a norm of the Basic Law which guarantees freedom is not decisive. If the state is obligated by a fundamental norm which determines value to protect an especially important legal value effectively even against the attacks of third parties, measures will often be unavoidable which touch upon the areas of freedom of other bearers of fundamental rights. In this respect, the legal situation in the employment of social-legal or civil law means is not fundamentally different than the enactment of a penal norm. Differences exist, perhaps, with respect to the intensity of the required interference. In any case, the legislature must resolve the conflict arising from this situation through a balancing of both of the fundamental values or areas of freedom in opposition to each other according to the standard of the ordering of values in the Basic Law and in consideration of the constitutional principle of proportionality. If one were to generally deny that there was any duty to employ the means of the penal law, the protection of life, which is to be guaranteed, would be essentially restricted. The seriousness of the sanction instituted for the annihilation is to correspond to the worth of the legal value threatened with destruction. The elementary value of human life requires criminal law punishment against the annihilation of life.[1012]

The FCC emphasized the importance of the legal value *enjeu* and, in view of the gravity of the violation effectuated through abortion, acknowledged that the consequences of the political duty to punish on the fundamental values and the freedom of other bearers of fundamental rights cannot be foreclosed. The 'intensity' of the required interference was signified as an indicator of difference between socio-legal or civil law means and penal norms, yet was not elaborated on. The dissenting opinion on the contrary points to the 'intensity' of penal law measures as the decisive parameter in appreciating the meaning thereby produced from the vantage point of the law of human dignity and fundamental rights. Ultimately, the Court defined the standards that the

[1009] Wittgenstein, *Tractatus,* (4.121)
[1010] ibid (4.1212)
[1011] See another excerpt that intimates the logical form in the *Abortion I Case*, BVerfGE 39, 1 (26) ['[…] in enacting penal norms, it should be considered that limits should be set to the penal law from the precept of sensible and moderate punishment.']
[1012] BVerfGE 39, 1 (47)

legislature should apply in resolving this conflict of fundamental values, namely the value order of the Basic Law and the principle of proportionality, both conceptual embodiments of law's meta-dimension, and deferred to the legislature on the statutory regulation of abortion. Law's humanism and pragmatism intersect: to effectively ensure humanism, concretized as the duty to protect unborn life in the *Abortion I Case*, the legislature cannot be denied the option of employing penal law measures. The gravity of the sanction corresponds to the worth of the legal value threatened.

vii. The portrayal of abortion as a 'phenomenon of social life' within the legal language game

Controversy and discord over the question of the legal treatment of abortion are mirrored in the Court's legal language game. How should law react to the phenomenon of the interruption of pregnancy? 'Various points of view'[1013] compose the setting of public discussion. Abortion is an exceptionally multidimensional 'phenomenon of social life' raising 'manifold problems of a biological, especially human-genetic, anthropological, medical, psychological, social, social-political, and not least of an ethical and moral-theological nature, which touch upon the fundamental questions of human existence.'[1014] The FCC hints not only at the various facets of human being-ness manifested in the *Abortion I Case*, but also at the content of the field of sight corresponding to the abortion language game. In the legal language game, as a subtotal of a language game, the Court demonstrated awareness of the diverse sources of insights into the subject matter.

Identification of controversy and discord over the legal treatment of the interruption of pregnancy[1015] and reference to the multidimensionality of the problem set the stage for the decision of the Court on the legal treatment of abortion in line with the Basic Law, particularly the law of human dignity. In view of the slipperiness of the case

[1013] BVerfGE 39, 1 (35)
[1014] BVerfGE 39, 1 (35f.)
[1015] For instance, the FCC looked into the legislative history of Art. 2 sec. 2 sent. 1 GG in support of the principle [*Grundsatz*] that in doubtful cases an interpretation that furthers to the highest possible degree the judicial effectiveness of the fundamental norm should be preferred [See BVerfGE 39, 1 (37f.)]. The Court presented different arguments that arose in the debate between Representatives in the Parliamentary Council on issues such as how compulsory sterilization and abortion should be treated in light of the right to life [BVerfGE 39, 1 (38f.)]. The Court overviewed the debate and did not exclude from the legal language game opposition to the dominant position on the matter, BVerfGE 39, 1 (39) ['However Parliamentary Representative Dr. Greve (SPD) declared: "I must explicitly say here, for the record, that at the least as far as I am concerned, I do not understand the right of germinating life to be within the right to life."']

before the Court this foreground serves a rhetorically significant function: it underlines the difficulty of constructing arguments on the subject matter that are universally persuasive. Consequently, the Court sought to establish the relevance of the decision, which could well be understood as a contribution to the argumentation on abortion, to the state of the discourse. In light of the linguistic-analytical model, the constant state of flux of the boundaries delineating the legal language game represents the multidimensionality of the matter as exemplified in the *Abortion I Case.*

The conflict in the *Abortion I Case* is synopsized in the *infra* excerpt:

> The right of the woman to the free development of her personality, which has as its content the freedom of behavior in a comprehensive sense[1016] and accordingly embraces the self responsibility of the woman to decide against parenthood and the responsibilities flowing from it, can also, it is true, likewise demand recognition and protection. This right, however, is not guaranteed without limits – the rights of others, the constitutional order, and the moral law limit it. *A priori,* this right can never include the authorization to intrude upon the protected sphere of right of another without justifying reason or much less to destroy that sphere along with the life itself; this is even less so, if, according to the nature of the case, a special responsibility exists precisely for this life. [1017]

The Court justifies the limits set to the freedom of the pregnant woman to the development of her personality by recourse to the rights of others, thus directly invoking a relational account of fundamental rights meaning, the constitutional order, namely the critical lens of constitutional law and the totality structure it generates, and, finally, the moral law. Parallels can be fluently drawn between the text and the definition of freedom in *Totality and Infinity.* Freedom 'must justify itself' [1018] and freedom is not 'justified by freedom'[1019]. Limits can and need to be set to its arbitrariness[1020], and it must be tempered with justice.

Constitutional law appears plainly as the critical lens forming the viewpoint of the judge's eye and permeates comprehensively the legal language game in framing the meaning of abortion, understood primarily as significance, in the following statement:

> […] the fundamental attitude of the legal order which is required by the constitution with regard to the interruption of pregnancy becomes clear: the legal order may not make the woman's right to

[1016] See Levinas, *Totality and Infinity,* 223 [freedom]
[1017] BVerfGE 39, 1 (43)
[1018] ibid 303
[1019] ibid
[1020] ibid

> self-determination the sole guideline of its regulations. The state must proceed, as a matter of principle, from a duty to carry the pregnancy to term and therefore to view, as a matter of principle, its interruption as an injustice. The disapproval of abortion must be clearly expressed in the legal order. The false impression must be avoided that the interruption of pregnancy is the same social process as, for example, approaching a physician for healing an illness or indeed a legally irrelevant alternative for the prevention of conception. The state may not abdicate its responsibility even through the recognition of a 'legally free area,' [*rechtsfreien Raumes*] by which the state abstains from the evaluation and abandons this judgment to the decision of the individual to be made on the basis of his own sense of responsibility. [1021]

The interval of a hypothetical, 'approaching a physician for healing an illness', serves to explain what could amount to a false impression. The dramatization by means of creating a plot, a scenario, is tantamount to a vivid incarnation of the event of false impression. In terms of enhancement of the rationality of the point furthered, this dramatization is not significant. What purpose does it serve? Responding to that question could require the traversal of disciplinary boundaries so as to plunge into poetics or literary criticism. For the purposes of this critical reflection on the text, it suffices to note that, from a mainstream perspective, the dramatization identified in the text, does not necessarily ameliorate the argument. It intensely, however, triggers the visualization of the scenario of a false impression, it arms the argument with poetic and rhetorical force and it penetrates our feelers, aiming probably at sensitizing and influencing those at the receiving end of the produced meaning at the level of legal consciousness.[1022]

viii. Law's meta-dimension and the value order [*Wertordnung*] as a tool of critical reflection

Reference to the ethical and moral-theological aspects of abortion 'which touch upon the fundamental aspects of human existence […]'[1023] resonates law's meta-dimension, which is practiced, as argued, exceptionally in human dignity legal language games. The doctrine of the objective ordering of values constitutes a foundational aspect of argumentation in the *Abortion I Case,* while the language it introduces into the legal language game witnesses the practice of law's meta-dimension. On closer look, in uttering nonsense – what can only be 'shown' – the concept of the objective ordering of

[1021] BVerfGE 39, 1 (44)
[1022] Binder & Weisberg, *Literary Criticism of Law* (2000) 477 [Practicing law, that is, exercising power over the production of meaning 'depend[s] upon an aesthetic and dramaturgic activity […].']
[1023] BVerfGE 39, 1 (35)

values triggers critical reflection on how, or whether, law's meta-dimension finds practice in the Court's legal language game.

> According to the constant jurisprudence of the Federal Constitutional Court, the fundamental legal norms contain not only subjective rights of defense of the individual against the state but embody, at the same time, an objective ordering of values, which is valid as a constitutionally fundamental decision for all areas of the law and which provides direction and impetus for legislation, administration, and judicial opinions [cited cases omitted]. Whether and, if so, to what extent the state is obligated by the constitution to legal protection of developing life can therefore be concluded from the objective-legal [*objektiv-rechtlichen*] content of the fundamental legal norms.[1024]

The profound authority of the objective ordering of values, 'as a constitutionally fundamental decision for all areas of the law', over the meaning produced in legal language games is particularly problematic from a linguistic-analytical perspective. The decisive impact of the objective ordering of values on the viewpoint of legal actors is portrayed as 'direction' and 'impetus' for all branches of state power to adhere to those values in producing meaning from their respective viewpoints. Each field of the legal order 'according to its special function'[1025] adheres to the objective ordering of values. Ethics direct and drive law's practice. The objective ordering of values as 'the objective-legal content of the fundamental legal norms' compels the legal protection of developing life, in other words defines 'whether' and 'to what extent' there is a constitutional duty to protect developing life. This duty 'is comprehensive', namely entails 'not only self-evidently direct state attacks on the life developing itself' but also the protection and promotion of this life, 'that is to say, it [the state] must, above all, preserve it even against illegal attacks by others.'[1026]

The doctrinally introduced concept of the objective ordering of values communicates that values are determinants of meaning in legal language games. It should be highlighted that the Court in the *Abortion I Case* did not identify specific values, but rather affirmed that an objective ordering of values exists and has controlling influence on the production of meaning. Values allude to ethics, hence law's meta-dimension, whereas the words 'objective' and 'ordering' suggest the totality that serves as the doctrinal vessel of those values within the legal language game. The 'fundamental

[1024] BVerfGE 39, 1 (41f.)
[1025] BVerfGE 39, 1 (42)
[1026] BVerfGE 39, 1 (42)

legal norms' that 'embody' an objective ordering of values imply a totality structure. Concentrating presently on the linguistic-analytical understanding, it would be fair to assume, at least at first glance, that the concept of the objective ordering of values attempts, partly, to put into words the ineffable. Is the objective value order doctrine an appropriation of law's meta-dimension to legal language games? Does law's meta-dimension survive this appropriation? Does subsumption under the *sui generis* totality structure of legal language games alone suffice to ensure the humane practice of legal values? Is the 'objective ordering of values' symptomatic of an oxymoron in view of linguistic-analytical and phenomenological insights? Does it force the transcendental, what can only be 'shown', not 'said', into propositions composing the legal language game?

Are there other conceivable understandings of the objective ordering of values doctrine in light of the linguistic-analytical insights at our disposal? The objective value order could be serving the purpose of stating the ethics 'shown' in the propositions of fundamental legal norms. Analogously, then, to Wittgenstein's considerations re the logical form and the transcendental, ethics and aesthetics, which are only 'shown' respectively in – and not expressed through – propositions and at the limit of the world, and as such must be exterior to the space defined by the limits of our language, what is the significance of the embodiment of ethics in law, and, what is more, what does the subjection of the transcendental to the construct of an 'objective ordering' mean? Another possible understanding springs from reflection on the conceivable hermeneutic purpose of this construct by analogy with the ladder metaphor; naming precisely what Wittgenstein contends can only be 'shown' and not 'said' functions as a ladder that assists us in ascending to understanding. The ladder then, Wittgenstein advices, should be discarded. Expressing that which amounts to nonsense if 'said' enhances the hermeneutic process. Unless this action is understood as a stage in a circle of critical reflection[1027] it can have the adverse effects of indeed rendering the witnessing of ethics

[1027] Palmer (1969) 25 ['For the interpreter to "perform" the text, he must "understand" it: he must perunderstand the subject and the situation before he can enter the horizon of its meaning. Only when he can step into the magic circle of its horizon can the interpreter understand its meaning. This is that mysterious "hermeneutical circle" without which the meaning of the text cannot emerge. But there is a contradiction here. How can a text be understood, when the condition for its understanding is already to have understood what it is about? The answer is that somehow, by a dialectical process, a partial understanding is used to understand still further, like using pieces of a puzzle to figure out what is missing. A literary work furnishes a context for its own understanding; a fundamental problem in hermeneutics is that of how an individual's horizon can be accommodated to that of the work. A certain preunderstanding of the subject is necessary or no communicton will happen, yet that

in law an oxymoron and of compromising the emptiness by establishing a *status quo*, that is, not throwing away the ladder after having climbed on it[1028]. A further question would investigate what necessitates putting into words law's meta-dimension in the first place, that is, stating and doctrinally framing the ineffable in the practice of law, and why the language chosen, the values conveyed and the values silenced or – ostensibly – ignored differ among legal orders and cultures; this enterprise however begs for the introduction of sociologically and historically derived insights into a transdisciplinary project, thus exceeds present purposes.

> The degree of seriousness with which the state must take its duty to protect increases as the rank of the legal value [*Rechtsgut*] in question increases in importance within the order of values of the Basic Law. [1029]

The hierarchy of legal values within the value order of the Basic Law is most relevant to the inquiry into law's meta-dimension in light of the law of human dignity. '*Rechtsgut*', the term used in the original text and translated into legal value at present, comprises the word 'Gut', which is found also under proposition (4.003) in the *Tractatus Logico-Philosophicus* as '*das Gute*', translated into 'the Good' in relation to *'das Schöne*', translated into 'the Beautiful'. Clearly 'the Good' suggests ethics, while 'the Beautiful' aesthetics. The term '*Rechtsgut*' denotes ethics and, as the *supra* excerpt indicates, *Rechtsgüter* accorded a particular rank in the order of values of the Basic Law. The gravity of the duty of the state to protect is analogous to the rank of the legal value *enjeu.* At a later stage in the Court's legal syllogism, 'life' is identified as the 'highest personal legal value'[1030].

How does Wittgenstein conceive of hierarchies in the *Tractatus Logico-Philosophicus* and how can linguistic-analytical insights refine our understanding of law's meta-dimension as it manifests in legal values? Hierarchies, according to

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understanding must be altered in the act of understanding. The function of explanatory interpretation in literary interpretation may be seen, in this context, as an effort to lay the foundations in "preunderstanding" for an understanding of the text.']; Binder & Weisberg, *Literary Criticism of Law* (2000) 124 ['Modern hermeneutics describes interpretation as a conversation between text and reader, in which the meaning of the text is its transformative impact on a reader. Hermeneutic theorists tend to portray interpretation as a 'circular' movement of dialogue between a reader and a text, since the reader must find what in the text is meaningful to her concerns, while being open to persuasion and learning from the text. In this way, hermeneutics suggests an ethic and epistemology of openness to persuasion by other points of view, and an aesthetic of openness to experience, or spontaneity.']; See, for theoretical grounds, Hoy, *The Critical Circle* (1982)

[1028] Wittgenstein, *Tractatus,* (6.54)

[1029] BVerfGE 39, 1 (42)

[1030] BVerfGE 39, 1 (59)

Wittgenstein 'are and must be independent of reality'[1031]. To the extent that legal values are perceived as components of a hierarchical structure, they are, in the sterilized and rigid tone of Wittgenstein's propositions in the *Tractatus Logico-Philosophicus*, independent of reality. Drawing this analogy enhances the portrayal ensuing from the above excerpt in that it intimates where legal values are to be located in the introduced model. The transcendental, namely the 'value' aspect of 'legal values', and the implied hierarchical structure in its entirety are 'independent of' or irrelevant to reality. What happens to the 'legal' aspect of 'legal values'? This is the meaning 'we ourselves construct', that is, produce, and, thus, 'can foresee'.[1032] This point evidently alludes to the notions of totality and infinity in the phenomenological account of the law of human dignity. The foreseeable and controllable, what lies within our grasp, corresponds to the totality quality of law, while the independence of hierarchy from reality evokes 'something always missing' as infinity. The inherently paradoxical Janus face of the notion of 'legal values', 'turned simultaneously to morality and to law' [1033], surfaces in this portrayal.

ix. Equation apropos human dignity

The FCC noted the irreconcilability of the human dignity v. human dignity conflict, since '[a] compromise which guarantees the protection of the life of the one about to be born' while permitting the pregnant woman to undergo abortion freely is impossible on account of the fact that 'the interruption of pregnancy always means the annihilation of the unborn life.'[1034]. The conflicting constitutional values are to be viewed, in line with established doctrine in FCC jurisprudence, 'in their relationship to human dignity, the center of the value system of the constitution [cited cases omitted].'[1035]

> A decision oriented to Art. 1 sec. 1 GG must come down in favor of the precedence of the protection of life for the child *en ventre sa mere* over the right of the pregnant woman to self-determination.

[1031] ibid (5.5561)
[1032] Wittgenstein, *Tractatus,* (5. 556)
[1033] Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 41(4) *Metaphilosophy* 464 at 470; See Georg Lohmann, ''Menschenrechte zwischen Moral und Recht' in Stefan Gosepath & Georg Lohmann, ed. *Philosophie der Menschenrechte* (Frankfurt am Main: Suhrkamp, 1998) 62–95
[1034] BVerfGE 39, 1 (43)
[1035] BVerfGE 39, 1 (43); BVerfGE 35, 202 (225) (1973) [*Lebach Case*] ['Hierbei sind beide Verfassungswerte in ihrer Beziehung zur Menschenwürde als dem Mittelpunkt des Wertsystems der Verfassung zu sehen.']

> Regarding many opportunities for development of personality, she can be adversely affected through pregnancy, birth and the education of her children. On the other hand, the unborn life is destroyed through the interruption of pregnancy. According to the principle of the balance which preserves most of competing constitutionally protected positions in view of the fundamental idea of Art. 19 sec. 2 GG precedence must be given to the protection of the life of the child about to be born. This precedence is valid as a matter of principle for the entire duration of pregnancy and may not be placed in question for any particular period of time. [1036]

This excerpt portrays concisely the conflict in the *Abortion I Case*. Proposition (6.2323) of the *Tractatus Logico-Philosophicus*[1037] reads, 'The equation characterizes only the standpoint [*den Standpunkt*] from which I consider the two expressions [*von welchem ich die beide Ausdrücke betrachte*], that is to say the standpoint of their equality of meaning [...]'. Equation does not serve 'to show that both expressions, which are connected by the sign of equality, have the same meaning: for this can be perceived from the two expressions themselves.'[1038] For present purposes it suffices to observe that human dignity operates as the standpoint apropos which the propositions in support of the protection of unborn life and those treating the right of the pregnant woman to self-determination are balanced in the above excerpt. Another factor influencing the equation is Art. 19 sec. 2 GG, which rules out interference with the essence [*Wesensgehalt*] of fundamental rights[1039].

Bearing in mind that linguistic-analytical insights deduced from the *Tractatus Logico-Philosophicus* serve as sources of analogies and impetus for critical reflection on the practice of the law of human dignity, the mathematical remark that 'equations express the substitutability of two expressions' certainly cannot accurately portray the *modus operandi* of balancing. Be that as it may, it intimates how the process of balancing operates in a human dignity v. human dignity conflict. The equation traced here is later elaborated on in the phenomenological portrayal of the *Abortion I Case* in view of Levinas' reflections on mediation.

[1036] BVerfGE 39, 1 (43)
[1037] Wittgenstein (n 1032) (6.2323)
[1038] ibid (6.232)
[1039] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 34 ['Zunächst darf die Unantastbarkeit (i.S. der Uneinschränkbarkeit) der Menschenwürde begrifflich nicht mit der Wesensgehaltgarantie vermischt werden. Art. 19 Abs. 2 garantiert im Zusammenhang mit der Eischränkbarkeit der Grundrechte (Art. 19 Ans. 1 S. 1) die Unantastbarkeit ihres Wesengehalts.']

x. Another self-reflective look: the majority opinion as a subtotal of the legal language game emanating from the eye of the dissenters (Dissenting opinion)

Naturally, the language practiced in the majority opinion features as the point of reference in the dissenting opinion. The dissenters noted that the majority had neglected to treat the uniqueness of the relationship between the child *en ventre sa mere* and the mother and moved on to distinguish abortion from other risks to life. Moreover, the majority's appreciation of the 'social fabric of problems [*Problematik*] previously found by the legislature'[1040], namely of surveyance of pragmatic considerations in the field of sight, was deemed insufficient by the dissenters. The legal language game of the majority opinion failed, according to the dissenters, to demonstrate comprehension of the 'aims of urgent reform'[1041]. The dissenters argued that 'each solution remains patchwork [*Stückwerk*]'[1042] and, therefore, from the viewpoint of the legislature and in line with comparative insights from 'other western civilized states'[1043], the preference of social-political measures instead of 'largely ineffective penal sanctions'[1044] is not 'constitutionally objectionable.'[1045]

> The constitution nowhere requires a legal 'disapproval' of behavior not morally respectable without consideration of its actual protective effect.[1046]

The dissenters defined the 'classical function' of the FCC as defense 'against injuries to this sphere of freedom from excessive infringement by the state power'[1047] and located penal provisions at the top of the hierarchy of possible infringements by the state, noting that 'they demand of a citizen a definite behavior and subdue him in the case of a violation with sensitive restrictions of freedom or with financial burdens.'[1048]

> Judicial control of the constitutionality of such provisions therefore means a determination whether the encroachment resulting either from the enactment or application of penal provisions into protected

[1040] BVerfGE 39, 1 (69)
[1041] BVerfGE 39, 1 (69)
[1042] BVerfGE 39, 1 (69)
[1043] BVerfGE 39, 1 (69)
[1044] BVerfGE 39, 1 (69)
[1045] BVerfGE 39, 1 (69)
[1046] BVerfGE 39, 1 (69)
[1047] BVerfGE 39, 1 (70)
[1048] BVerfGE 39, 1 (70)

> spheres of freedom is allowable; whether, therefore, the state, generally or to the extent provided, may punish.[1049]

The dissenters essentially agreed with the majority of the FCC re the constitutional permissibility of the term solution. Demonstrating surveyance of comparative insights and referring to the establishment, at the same period of time, of the third term solution in the seminal *Roe v. Wade* decision of the Supreme Court of the United States, the dissenters noted, '[t]his would, according to German constitutional law, go too far indeed.'[1050] However, they stressed, the meaning of fundamental rights is not to promote penal measures, but rather to draw the boundaries of this manifestation of state authority.

> According to the liberal character of our constitution, however, the legislature needs a constitutional justification to punish, not to disregard punishment, because, according to its view, a threat of punishment promises no success or appears for other reasons to be an improper reaction [cited decisions omitted]. [1051]

Application of the linguistic-analytical model to portray this position captures the distinct quality of the law of human dignity and fundamental rights; they are practiced as law, and at the same time set limits to law's practice. In linguistic-analytical terms, the priority of the law of human dignity and fundamental rights as lenses through which meaning is produced apropos all other legal means is associated with the linguistic and semantic overlapping of the human being, that is, the metaphysical subject at the limit of the world, and human dignity.

xi. Distinguishing between viewpoints (Dissenting opinion)

The differing meaning corresponding to viewpoints represented in the legal language game is transparently portrayed and commented on in the dissenting opinion. The dissenters drew a distinction between the viewpoint of the pregnant woman undergoing abortion or a third party performing the interruption of pregnancy with her consent and the viewpoint of the state. They stressed, 'the constitutional assessment of the killing of a child *en ventre sa mere* […] is less pertinent than drawing conclusions from such a killing by the state, as, for example, by the Nazi

[1049] BVerfGE 39, 1 (70)
[1050] BVerfGE 39, 1 (74)
[1051] BVerfGE 39, 1 (74)

regime which had taken up a rigorous position corresponding to its biologically oriented ideology towards population.' [1052]

The text of judicial decisions is just an aspect of the practice of law. The distinction among viewpoints portrayed in the legal language game of the dissenting opinion exemplifies this proposition, and conveys how facets of law's practice – especially those manifested on the face of individual human beings or related to the human factor within institutions – escape our grasp[1053]. State action as production of meaning is more extensively documented, hence accessible, than the meaning of the world of individual human beings as metaphysical subjects. In the case of the former, the probability that it is contained in the field of sight of legal actors is high. As regards the latter, the portrayal of their viewpoint and field of sight relies to a considerable extend on assumption or even – at times – bias; for that, the demonstration of an effort to soundly ground assumptions is imperative. In the *Abortion I Case*, the difficulty of constitutional assessment is intensified on account of the particularity of the relationship between the pregnant woman and the child *en ventre sa mere.*

xii. The employment of examples (Dissenting opinion)

The dissenters laid out a thorough presentation of the sociological phenomenon apropos the effectiveness of the legal condemnation of abortion by means of penal law. The pragmatic considerations raised in the dissenting opinion are analyzed to ultimately inform the viewpoint of the legislature, which, as the constitutional judge directs, 'cannot be indifferent to the fact that illegal interruptions of pregnancy lead even today to injuries of health […]'[1054]

> […] this is true not only in the case of abortions by 'quacks' and 'angel-makers,' but also, to a greater extent, in the case of procedures undertaken by physicians because illegality discourages the full use of modern equipment and assistance of the required personnel or hinders the necessary follow-up treatment. Further, the commercial exploitation of women inclined to an abortion in Germany and in foreign countries and the social inequality

[1052] BVerfGE 39, 1 (76)
[1053] A parallel can be drawn between what is referred to presently as 'the human factor' and 'human will'; the parallel elucidates the mutually reflexive relationship between the eye and the law as lens. See Binder & Weisberg, *Literary Criticism of Law* (2000) 462 ['The fundamental operation of law is to identify legal persons, entitlements, and preferences; when law has identified all of these, it has fully represented society. On this view of law, authority is vested solely in human will, and it is the essentially mimetic task of law to reflect and enforce that will.']
[1054] BVerfGE 39, 1 (83)

> connected with it -appears as a drawback; better situated women can, especially by traveling to neighboring foreign countries, much more easily obtain an abortion by a physician than poorer or less clever ones. Finally, the resulting possibility of subsequent criminality must be added to this; thus extortion with the knowledge of an illegal abortion stands in third place among the types of extortion. [1055]

The language initiated into the legal language game is certainly telling of the grassroots origin of the information; the inclusion of up-to-date language deduced apparently from a reality-check renders the practice of law relevant to life and broadens the boundaries of the legal language game. The unique viewpoints of metaphysical subjects and, consequently, of the (legal) language games emanating therefrom can be depicted in light of the concept of family resemblances as introduced in the *Philosophical Investigations*. The poetic and dramaturgic manner[1056] of attending to the human condition in practicing law evinced in the above excerpt and the fluency with which images are evoked in association with human dignity indicate how the term invites the institution of common language and meaning at least at the aesthetic, if not at the political and legal/doctrinal level. The advantage[1057] of pausing at this non-mainstream level of production of meaning for a moment is that we discover a niche in the practice of that law in texts, where the pluralism of unique viewpoints and, at the same time, lived experience, is celebrated as another field of critical reflection performed with an affirmative attitude towards alterity, rather than polemicized.

c. Phenomenological

The phenomenological portrayal of the practice of the law of human dignity in the *Abortion I Case* looks at points of controversy in the text through a lens grounded in insights and language derived from Levinas' *Totality and Infinity*. Who is conceived as the self and who is the other? What amounts to a responsible response and can we identify the face-to-face encounter in the majority or dissenting opinion?

[1055] BVerfGE 39, 1 (83)

[1056] Binder & Weisberg, *Literary Criticism of Law* (2000) 477 ['[…] the display of literacy, aesthetic refinement, and rhetorical skill are all means of staking a claim to […] symbolic capital.[1056] The "literary" use of language therefore has a practical, power-enhancing dimension. […] conserving authority involves a "negotiaion" or "exchange" of "symbolic capital" with norms, institutions, and individuals.']

[1057] ibid

i. Self-reflection, responsibility as ability to respond, and the portrayal of the human dignity v. human dignity conflict

Where in the text can the self's response to the other be traced? What amounts to a responsible answer to the other, in other words what are the standards that determine whether a response in fact reflects ability to respond? How do totality and infinity feature in the language employed? The phenomenological approach to the *Abortion I Case* revolves around such considerations. The FCC actively assumes its role in the self-reflection of the state as self and seeks to identify the pillars of the identity of that self.[1058]

The life developing itself in the womb of the mother is recognized as an independent legal value enjoying constitutional protection in accordance with Art. 2 sec. 2 sent. 1 GG and Art. 1 sec. 1 GG. The duty of the state to protect developing life is manifested negatively and positively. The Basic Law forbids direct state attacks against unborn life and requires the protection and fostering of this life. This duty of the state develops its effects even against the mother. The intervention of the state in the conflict between the human dignity of unborn life and the human dignity of the pregnant woman should, according to the Court, reflect the precedence of the protection of the child *en ventre sa mere* for the entire duration of the pregnancy over the pregnant woman's right to self-determination. In responding to the pregnant woman, the Court as self decided that an interruption of the pregnancy is constitutional, if necessary to avert a danger to her life or health. The Court added that the legislature, another manifested form of the state as self, has the latitude to identify further extraordinary burdens that justify leaving abortion unpunished.

The legislative reform should be compatible with the principle of inviolability of unborn life and, furthermore, ensue from the balancing of conflicting fundamental rights considerations apropos unborn life and the pregnant woman. The value judgment incarnated in the Basic Law should guide state actors in dealing with difficult conflicts.

[1058] BVerfGE 39, 1 (67) ['The Federal Constitutional Court, which is charged by the constitution with surveying the observance of its fundamental principles by all organs of the state and, if necessary, with giving them effect, can orient its decisions only on those principles to the development of which this Court has decisively contributed in its judicial utterances. Therefore, no adverse judgment is being passed about other legal orders "which have not had these experiences with a system of injustice and which, on the basis of an historical development which has taken a different course and other political conditions and fundamental views of the philosophy of state, have not made such a decision for themselves" [cited cases omitted].']

> A reform of the penal law which is oriented to the basic legal order must so structure the regulations governing abortion that the protection of developing life is guaranteed at the first opportunity under the circumstances. […] Therefore, an absolute precedence cannot be granted either to the one right or to the other. In especially difficult conflict situations, it is of importance to find solutions, which take into account the value judgment of the constitution […].[1059]

The regulation of terms was considered incompatible with the hierarchy of values in the constitution, because it creates the impression that every abortion within the first three months of pregnancy has the approval of the law.[1060] Emphasis on the impression created and the care about its implications hints directly at the interest in the quality of the relation to the other at the receiving end of the message conveyed, namely, at present, not just the human beings involved in the case, but also the legal subjects within the constitutional order of the Basic Law and – it could be argued – beyond, namely within a multilevel constitutionalism setting.

The speaking self and author in the *Abortion I Case* being the FCC, it is vital to first present how the Court understands its own role as the self who produces meaning. Constitutional review and the principle of the separation of powers manifested in the text as an aspect of judicial practice can be viewed as self-reflection mechanisms[1061]. The order of the Basic Law sets the terms of self-reflection as a totality structure. The *Fifth Statute to Reform the Penal Law* is a statutory regulation 'which was decided upon after extraordinary comprehensive preparatory work'. The role of the constitutional judge is to examine the work of the legislator 'only from the viewpoint of whether it is compatible with the Basic Law, which is the highest valid law of the Federal Republic.' [1062]

> The constitutional requirement to protect developing life is directed in the first instance to the legislature. The duty is incumbent on the Federal Constitutional Court, however, to determine, in the exercise of the function allotted to it by the Basic Law, whether the legislature has fulfilled this requirement. Indeed, the Court must carefully observe the discretion [*Spielraum*] of the legislature which belongs to it in evaluating the factual conditions which lie at the basis of the formation of norms by it, of the required prognosis and the choice of means. The court may not put itself in the place of the legislature; it is, however, its task to examine carefully whether the

[1059] BVerfGE 39, 1 (12f.)
[1060] BVerfGE 39, 1 (12)
[1061] Schnapp (1989) 1, 8
[1062] BVerfGE 39, 1 (36)

> legislature, in the framework of the possibilities standing at its disposal, has done what is necessary to avert dangers from the legal value to be protected. This is also fundamentally true for the question whether the legislature is obligated to utilize its sharpest means, the penal law, in which case the examination can extend beyond the individual modalities of punishment.[1063]

Addressing the social phenomenon of abortion necessarily involves responding to the other, namely the human beings portrayed in the text of the *Abortion I Case.* Doing 'what is necessary to avert dangers' constitutes a responsible answer to the other in the context of the *Abortion I Case.* A responsible answer is also contingent on the measures adopted to regulate abortion. Do penal law measures, the sharpest means of punishment, amount to a responsible answer? The purpose of this study being the portrayal of practice and the identification of questions that may trigger further reflection and inquiry across disciplines, I do not engage in affirming or negating the exercise of responsibility, that is, ability to respond, on the part of the FCC. Rather, I point to instances in the Court's reasoning that raise questions on judicial responsibility. In practicing the Basic Law, the FCC as the self and author of decisions sometimes demands that other selves act or refrain from acting. The following conditional presents an example of how the FCC orients society, another self, towards an understanding of the other and the world in accordance with the value order of the Basic Law.

> If society recognizes developing life as a legal value worthy of protection and of comparably high rank, it could not make the destruction of this legal value dependant upon the untrammeled pleasure[1064] of the individual without coming into conflict with this premise […].[1065]

For this mechanism of self-reflection to effectuate, the FCC incorporated in the text of the *Abortion I Case* the meaning produced by other manifested forms of the state as self, first and foremost by the legislature.[1066] The legislature concluded after surveying different viewpoints composing the discourse on abortion on 'the manner in which the legal order should respond to this social process' [1067]. The

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[1063] BVerfGE 39, 1 (51)
[1064] See *infra* for the comment on the phrase 'untrammeled pleasure of the individual' in light of insights from *Totality and Infinity*.
[1065] BVerfGE 39, 1 (13)
[1066] Schnapp (1989) 1, 8 ['Die Grundrechtsbindung der Legislative ist institutionell durch die Verfassungsgerichtsbarkeit gesichert.']
[1067] BVerfGE 39, 1 (36)

various viewpoints evoke the notion of vision and suggest how discourses are made up of intersecting totalities. An intersubjective space eventuates in the intersection of the totality of language games – including, of course, the legal language game of the Court. Totality and infinity thus coexist in the judicial practice of law.

> It is the task of the legislature to evaluate the many sided and often opposing arguments which develop from these various ways of viewing the question, to supplement them through considerations which are specifically legal and political as well as through the practical experiences of the life of the law, and, on this basis, to arrive at a decision as to the manner in which the legal order should respond to this social process. [1068]

The statutory indications in the presence of which an interruption of pregnancy performed by a physician with the consent of the pregnant woman should not be punishable (§ 218 StGB) can be perceived as responses to the other on the part of the legislature as self. The medical, ethical or criminological, and social or emergency indications are responses to the pregnant woman[1069]; the eugenic indication or indication from the condition of the child as laid out in the text of the *Abortion I Case* can be viewed as a response to the pregnant woman and the unborn child.

> (b) if, according to the judgment of medical science, compelling reasons require the assumption that the child, as a consequence of a hereditary disposition or the consequence of harmful influences before birth, will suffer damage to its condition of health which cannot be alleviated and which condition is so serious that the continuation of the pregnancy cannot be demanded from the pregnant woman, provided that not more than 20 weeks have elapsed since the beginning of the pregnancy (§ 219b Eugenic or Indication from the Condition of the Child). [1070]

[1068] BVerfGE 39, 1 (36)

[1069] BVerfGE 39, 1 (13f.) ['(a) if the interruption of the pregnancy was indicated in the judgment of medical science in order to avert from the pregnant woman the danger for her life or the danger of a serious impairment of the state of her health insofar as the danger could not be averted in any other way which was exactable for her (§219 Medical Indication); (c) when an illegal act has been committed against the pregnant woman pursuant to §176 (the sexual abuse of children), §177 (rape) or §179, Par. i (the sexual abuse of those incapable of resistance) and compelling reasons require the assumption that the pregnancy resulted from the act, provided that no more than twelve weeks have elapsed since the beginning of the pregnancy (§219c Ethical or Criminological Indication); (d) if the interruption of the pregnancy is indicated in order to avert from the pregnant woman the danger of a grave calamity, provided that the danger cannot be averted in another way that is exactable from her and if not more than twelve weeks have elapsed since the beginning of the pregnancy (§219d Social or Emergency Indication).']

[1070] BVerfGE 39, 1 (13)

The serious condition of the child justifies not demanding the continuation of pregnancy from the pregnant woman. This indication constitutes a response to an extreme case[1071] of harm to developing life and, at the same time, mirrors the particularity of the relation between the pregnant woman and the unborn child, the two manifestations of the other in the *Abortion I Case* and a crosscutting theme in the Court's syllogism. How does the Court depict pregnancy as a manifestation of human being-ness? The phenomenological substantiation of human being-ness sets off from the first-person viewpoint, 'who is speaking and why'[1072] and, in that respect, differs from an ontological treatment of the question.

The Court admitted that punishment 'can never be an end in itself' [1073]. Rather, penal norms constitute the 'ultima ratio'[1074] in the arsenal of the legislature. Only as the ultimate response to the other are penal measures proportional. The principle of proportionality is 'a principle of the rule of law, which prevails for the whole of the public law, including constitutional law' [1075]. The meta-dimension of the principle of proportionality can be paralleled, in linguistic-analytical terms, to the logical form and, in phenomenological terms, to the curvature of an intersubjective space. The duty to punish by means of penal sanctions is no 'absolute' but rather 'relative' in that it 'grows out of the insight into the inadequacy of all other means.' [1076]

Resisting the legal condemnation or punishment of interruptions of pregnancy is incompatible with the duty of the legislature to protect life 'if the interruptions are the result of reasons which are not recognized in the value order of the Basic Law […]' [1077], argued the FCC. That only reasons recognized in the value order of the Basic Law matter, denotes the sharp distinction between the sphere of law and the sphere of self-determination and self-responsibility of the pregnant woman. At the same time, the distinction indicates that the motives and circumstances leading the pregnant woman to abortion are ethically appreciated from the vantage point of the ordering of values of the Basic Law. How are specific reasons deduced and identified? Is the totality representing the vision of the self, looking at life through the lens of law, determinant of the reasons compatible with the value order of the Basic

[1071] See Baer, 'Triangle' 417 at 459 f. [extremism tendency]
[1072] Levinas, *Totality and Infinity,* 18 [Introduction by John Wild]
[1073] BVerfGE 39, 1 (46)
[1074] BVerfGE 39, 1 (47)
[1075] BVerfGE 39, 1 (47)
[1076] BVerfGE 39, 1 (47)
[1077] BVerfGE 39, 1 (65)

Law? Are these reasons contingent on 'the inexhaustible richness of our lived experience'[1078]?

> Indeed, the limiting of punishability would not be constitutionally objectionable if it were combined with other measures, which would be able to compensate, at least in their effect, for the disappearance of penal protection. That is however – as shown – obviously not the case. The parliamentary discussions about the reform of the abortion law have indeed deepened the insight that it is the principal task of the state to prevent the killing of unborn life through enlightenment about the prevention of pregnancy on the one hand as well as through effective promotional measures in society and through a general alteration of social concepts on the other. Neither the assistance of the kind presently offered and guaranteed nor the counseling provided in the *Fifth Statute to Reform the Penal Law* are, however, able to replace the individual protection of life which a penal norm fundamentally provides even today in those cases in which no reason for the interruption of pregnancy exists which is worthy of consideration according to the value order of the Basic Law. [1079]

Legal actors must explicitly demonstrate 'less interest in conceptual constructions and a greater readiness to listen and learn from experience.'[1080] Totalities are only one, indeed necessary, stage of a critical reflection process in view of the infinite unique manifestations of human being-ness in lived experience. Encountering the other in responsibility, hospitality and generosity, that is, understanding language as practice and justice[1081], requires articulation of the criteria, processes, sources of knowledge and methodologies on which the self grounded the assessment of unreasonableness apropos the value order of the Basic Law in *ad hoc* instances; otherwise, the soundness of the subsumption of reasons under the totality of the value order is impaired.

Effectiveness is the critical standard for assessing responsibility as the ability to respond. The limiting of punishability would be constitutional were it combined with other measures; this 'is however – as shown – obviously not the case.' Is ineffectiveness as prevalent as the Court contented, hence a sound justificatory basis for rejecting the statutory reform so unequivocally? Does the speaking self responsibly articulate and offer to the other the meaning produced? The dissenting opinion in the *Abortion I Case,* as discussed *infra*, raises an opportunity for

[1078] Levinas (n 1072) 12 [Introduction by John Wild]
[1079] BVerfGE 39, 1 (65)
[1080] Levinas (n 1072) 16 [Introduction by John Wild]
[1081] ibid 213

juxtaposition of responses. The Court resorted to parliamentary discussions on the reform of the abortion law. The separation of powers appears in texts as aspects of judicial practice and sets forth a self-reflection mechanism[1082]. This mechanism enhances the progression of the argumentation by incorporating insights into the subject matter, which the speaking self, here the Court, is neither competent nor responsible to draw alone. The FCC noticed how parliamentary discussions had deepened the insight that abortion should be counteracted 'through enlightenment about the prevention of pregnancy', namely through the exertion of influence on the viewpoint of the other, yet conveys a significantly different tone than 'reminding' that strongly evokes state paternalism. Other means for the prevention of abortion would be 'effective promotional measures in society' and 'a general alteration of social concepts'.[1083] In linguistic-analytical terms, the alteration of social concepts signifies the change of the limits of the world, which would 'thereby become quite another'[1084].

The Court shed light on what constitutes a responsible answer to the other, mindful of the value order of the Basic Law, in other words the totality of ethics within the constitutional order or the totalizing of the transcendental. The Court, based on a reality-check of the actual effectiveness of measures deemed most appropriate to prevent abortion in view of insights deduced from the parliamentary discussions, argued that neither the assistance presently offered nor the counseling provided in the statutory reform could replace the individual protection of life ensured fundamentally by penal norms. In other words, the FCC upheld the employment of penal measures as a responsible, namely effective, answer to unborn life. The only reservation concerned cases where reasons for abortion exist which are 'worthy of consideration according to the value order of the Basic Law'[1085]. If the legislature considers the undifferentiated threat of punishment 'a questionable means for the protection of life'[1086], it can opt for differentiated penal regulation. Be that as it may, the legislature 'is not thereby released from the duty to undertake the attempt to achieve a better protection of life'[1087] and to introduce penal measures for those cases of interruption of pregnancy condemned on constitutional grounds.

[1082] See Schnapp (1989) 1, 1
[1083] BVerfGE 39, 1 (65)
[1084] Wittgenstein, *Tractatus,* (6.43)
[1085] BVerfGE 39, 1 (65)
[1086] BVerfGE 39, 1 (65)
[1087] BVerfGE 39, 1 (65)

The phenomenological account of humanism consists in responding to the other in responsibility, generosity and hospitality. The definition of what amounts to a responsible answer to the other in *ad hoc* instances of practicing the law of human dignity determines *in concreto* the meaning of humanism. The effectiveness of penal measures panegyrized in the majority opinion of the *Abortion I Case* lies significantly in their didactic function. Penal norms have the power to shape individual and collective legal awareness. There are still standards that need to be met for penal measures to qualify as a responsible answer. Cases demanding penal regulation should be clearly distinguished from those in which the continuation of pregnancy is an unreasonable expectation on the part of the state. Clarity 'will strengthen the power of the penal norm to develop legal awareness' [*wird die rechtsbewußtseinsbildende Kraft der Strafnorm verstärken*][1088], in other words will enhance its effectiveness. The Court identified the shaping of legal awareness as the *telos* of punishment. The cultivation of legal awareness is imperative for abortion to be effectively averted. Are penal measures, still, a responsible answer?

> One who generally recognizes the precedence of the protection of life over the claim of the woman for an unrestricted structuring of her life will not be able to dispute the unjust nature of the act in those cases not covered by a particular indication. [1089]

The FCC sought to harmonize the viewpoint of the – individual and collective – other with the viewpoint formed by the law as a lens before the eye of the self, namely, in the present instance, of the constitutional judge. Despite the recognition of the latitude of the legislature to identify further indications rendering the prohibition of abortion by penal measures unreasonable, the enumeration of particular indications as such implies a totality structure imposed on the experience of the other and rendering it graspable. Critical reflection should focus on whether categories of indications conceptually foreclose the infinity of case-specific, unique reasons – circumstances and motivations – for undergoing an abortion. The dual sense of 'something missing' as the defining aspect of law's *Menschenbild* and the non-subsumption or subsumption of each case under an indication are two different stories.

[1088] BVerfGE 39, 1 (66)
[1089] BVerfGE 39, 1 (66)

The assertion that one who values and recognizes the precedence of the protection of life over the claim of the woman to exercise her freedom without restrictions 'will not be able to dispute the unjust nature of the act' where it is not covered by indications begs critical reflection. Is it an assumption? An oversimplification? A generalization? Or does neutrality and logical consistency evident in the argument that 'one who generally recognizes the precedence of the protection of life' cannot concede to an act that necessarily destroys life suffice as grounds for the soundness of the syllogism? From a phenomenological perspective, the Court's approach to the development of legal awareness destroys the essential distance between the self and the other.

> If the state not only declares that these cases are punishable but also prosecutes and punishes them in legal practice, this will be perceived in the legal consciousness of the community neither as unjust nor as anti-social. [1090]

The rhetorical and didactic significance of punishment is plain to see. The declaration of punishability and the actual prosecution and punishment of abortion in legal practice reinforce the statement made by the constitutional order re the value of life. The perception of the penalization of abortion as being neither unjust nor anti-social, however, does not necessarily mean that an affirmative proposition, namely that penalization is just and social, holds true. For the latter proposition to stand, separate elaboration on its grounds is required, for instance by means of putting forward concrete arguments in support of the just and social character of penalization or bringing forth empirical evidence of how the members of the community perceive of penalization. Critical reflection on the negative articulation is therefore called for to examine whether this suffices to soundly establish positively delineated grounds for upholding the penalization of abortion in the legal consciousness of the community.

The Court concluded on the nullity of the provision '[w]ithin this framework' [*'[in] diesem Umfang'*][1091]. Nullity [*'Nichtigkeit'*][1092], from a phenomenological perspective, constitutes the response of the FCC to the legislature's non-response or irresponsible response to the other. § 218a StGB as in the *Fifth Statute to Reform the Penal Law* was found incompatible with Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 sent. 1 GG for excluding from penalization even those cases of abortion

[1090] BVerfGE 39, 1 (66)
[1091] BVerfGE 39, 1(68)
[1092] BVerfGE 39, 1(68)

for which no reasons, recognized within the value order of the Basic Law, exist. Incompatibility with the value order can be construed to suggest an irresponsible response to the other. However, in the hermeneutic and literary analysis of the text of the *Abortion I Case*, effectiveness has surfaced as the key language in the production of meaning. Apropos the standard of effectiveness as the indicator of responsibility the nullity of the provision is a reaction to the legislature's non-response to the social phenomenon of abortion; an ineffective response is equivalent to non-response.

The FCC enjoined the legislature to practice the principle of proportionality 'only cautiously and with restraint.'[1093]. Constitutional review and the principle of the separation of powers are mirrored in texts as aspects of judicial practice and are presently portrayed as a self-reflection mechanism. The legislature, held the Court, is not prohibited from expressing the constitutionally required legal condemnation of abortion required by the Basic Law in ways other than the threat of punishment, in other words has the latitude to choose how to respond.

> The decisive factor is whether the totality of the measures serving the protection of the unborn life, whether they be in civil law or in public law, especially of a social-legal or of a penal nature, guarantees an actual protection corresponding to the importance of the legal value to be secured. In the extreme case, namely, if the protection required by the constitution can be achieved in no other way, the legislature can be obligated to employ the means of the penal law for the protection of developing life. [1094]

'Actual protection' is the standard for judging whether the response to developing life, 'the legal value to be secured', is responsible and commensurate to its importance. The humanism of law, expressed in the protection of legal values, is contingent on the pragmatism implied by the requirement of actual protection through the practice of law. The 'final means' of punishment 'must also be employed, if an effective protection of life cannot be achieved in other ways'[1095]. A responsible answer to the other, here to developing life, is a response that develops effects. The 'worth and significance'[1096] of the legal value *enjeu* require an effects-oriented approach to the practice of state responsibility in line with the Basic Law.

Delivering upon the duty to protect developing life against the mother by means of penal law 'may give rise to special problems, which result from the unique

[1093] BVerfGE 39, 1 (48)
[1094] BVerfGE 39, 1 (46f.)
[1095] BVerfGE 39, 1 (47)
[1096] BVerfGE 39, 1 (47)

situation of the pregnant woman.'[1097] The pregnant woman as the other is understood in the *Abortion I Case* as a human being in a unique physical and emotional condition that is 'immediately evident and need not be set forth in greater detail.' [1098] What can be derived from this description for the purposes of the present portrayal is the uniqueness of the state of being pregnant as a concrete image of human being-ness, and the intimation of the multidimensionality of human being-ness through emphasis on both the physical and emotional condition of the pregnant woman. Whether this portrayal is telling of a relation with the other instituted in language and substantiating, in consequence, the ability of the speaking self to respond, remains open to critical reflection and requires closer scrutiny. Justification in legal argumentation, in light of phenomenological insights, amounts to the articulation of the world as an offering to the other, that is, in responsibility and generosity. The 'immediately evident', in rendering further explications redundant, could justify overlooking the importance of demonstrating how the self came to a particular appreciation and portrayal of the other, and the value of putting forward illustrative concrete examples.

Decisions involving moral judgments are inherently ambiguous and controversial, because, as the linguistic-analytical portrayal of the law of human dignity shows, metaphysical subjects, the bearers of ethics and aesthetics, are 'a boundary of the world'[1099], hence same in that everything they see and describe could also be otherwise. The phenomenological enhancement of the introduced model with Levinas' insights into the radical separation between the self and the other allows for another understanding of the self-restraint required on the part of the legislature, namely, ultimately, the responsible state actor for deciding whether the conduct of the pregnant woman deserves punishment or not, and whether an interruption of pregnancy is constitutionally accepted upon balancing the conflicting interests.

Unreasonableness is the standard for evaluating whether the self demonstrated the ability to respond to the other in the *Abortion I Case*. The FCC engaged in the determination of the content of this standard. It first excluded circumstances 'which do not seriously burden the party under duty, since they represent the normal situation

[1097] BVerfGE 39, 1 (48)
[1098] BVerfGE 39, 1 (48)
[1099] Wittgenstein, *Tractatus*, 15-16 [Introduction]

with which everyone must cope.'[1100] Critical reflection on the words 'seriously' and 'normal' poses the question: Do they arbitrarily totalize the portrayal of human beings involved and of their lived experience? The Court further explained that only circumstances 'of considerable weight', which 'render the fulfillment of the duty of the one affected extraordinarily more difficult, so that fulfillment cannot be expected from him [or her] in fairness [reasonably]' [*die dem Betroffenen die Erfüllung seiner Pflicht außergewöhnlich erschweren, so dass sie von ihm billigerweise nicht erwartet werden kann*][1101], can ground the assessment of unreasonableness of the burden on the pregnant woman.

Inner conflicts experienced by the pregnant woman qualify as unreasonable burdening; responding to such circumstances with criminal penalties 'does not appear in general to be appropriate' [*angemessen*][1102], namely does not amount to a responsible answer to the pregnant woman on the part of the state. The Court explained that the employment of criminal penalties in such cases 'applies external compulsion where respect for the sphere of personality of the human being demands full inner freedom of decision.'[1103] External compulsion alludes to the forced traversal of limits in the ontological account of the practice of the law of human dignity, and can be phenomenologically depicted as subsumption of the personal sphere of the human being under a totality that effectively denies the other the very possibility of producing own meaning. External compulsion, in other words, destroys the possibility of conversation. Conversation, explains Levinas, cannot 'renounce the egoism'[1104] of the self; in conversation the other as Other is granted 'a *right* over this egoism'[1105].

The standard of unreasonableness mediates the self's response to the other. The FCC applied the standard of unreasonableness to the indications introduced by the statutory reform under scrutiny. The Court agreed that the interruption of pregnancy is reasonable 'when it is proven that [it] […] is required 'to avert' from the pregnant woman 'a danger for her life or the danger of a grave impairment of her condition of health' (§ 218b, No. 1 […]).'[1106] Sacrificing[1107] the right to life and

[1100] BVerfGE 39, 1 (49)
[1101] BVerfGE 39, 1 (49)
[1102] BVerfGE 39, 1 (49)
[1103] BVerfGE 39, 1 (49)
[1104] Levinas, *Totality and Infinity*, 40
[1105] ibid
[1106] BVerfGE 39, 1 (49)
[1107] The notion of sacrifice appears in the analysis of the *Aviation Security Act Case*, where it is extensively discussed.

bodily inviolability under Art. 2 sec. 2 sent. 1 GG 'cannot be expected of her for the unborn life'[1108]. Similarly to the medical indication, the legislature is free to leave the interruption of pregnancy unpunished in the case of burdens for the pregnant woman, which are as weighty 'from the point of view of unreasonableness'[1109]. Such are the extraordinary burdens associated with eugenic, ethical-criminological, and social or emergency indications[1110] for abortion.

ii. The evolving self

The practice of human dignity language within the German constitutional order takes on a distinct meaning in view of the historical background of National Socialism[1111]. The state, understood as an evolving self, consciously opposed the totalitarian state of National Socialist Regime. The *ipseity* of the evolving self who speaks at the present time demands awareness of who the self was and aims at becoming. Perceiving the Basic Law as a reaction to the National Socialist Regime, and declaring consciousness of the responsibility before God and human beings in the Preamble and recognition on the part of the German people of 'inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world', in Art. 1 sec. 2 GG, indicate the present, past and future of the state as an evolving self.

The Basic Law is the critical lens before the eye of state actors and as such formative of their viewpoint. The contrast between the incorporation of 'the self-evident right to life' into the Basic Law and the Weimar Constitution, noted the Court, 'may be explained principally as a reaction to the 'destruction of life unworthy of life', to the 'final solution' and 'liquidations,' which were carried out by the National Socialist Regime as measures of state.'[1112] The right to life guaranteed under Art. 2 sec. 2 sent. 1 GG along with the abolition of death penalty in Art. 102 GG declare the fundamental worth of human life and convey a constitutional order that is the antithesis of the totalitarian, limitless state of the National Socialist Regime for which 'individual life meant little'[1113] and was, just as death, at the disposal of detrimental state practices. Historical context exerts influence on the meaning,

[1108] BVerfGE 39, 1 (49)
[1109] BVerfGE 39, 1 (49)
[1110] The social indication implies the identification of the social dimension of law's *Menschenbild*.
[1111] Hufen (2004) 313, 313
[1112] BVerfGE 39, 1 (36)
[1113] BVerfGE 39, 1 (36)

signification and significance, of the other human being, of human being-ness and of human dignity.

iii. Tracing totality and infinity: the value order and the law of human dignity

The draft under scrutiny rejected the regulation of terms solution as irreconcilable with the value order of the Basic Law[1114], despite relevant lively discussions in the Weimar Republic and at the time of the *Abortion I Case* in favor of such regulation, and opted for the validity of 'exceptions from the fundamental prohibition of the interruption of pregnancy' only on the basis of statutory indications.[1115] The hierarchy of values in the Basic Law permeates the Court's reasoning in the *Abortion I Case,* particularly in the construction of the major premise of the legal syllogism.

> The gravity and the seriousness of the constitutional question posed becomes clear, if it is considered that what is involved here is the protection of human life, one of the central values of every legal order. The decision regarding the standards and limits of legislative freedom of decision demands a total view of the constitutional norms and the value order contained therein. [1116]

The phrase 'one of the central values of every legal order' [*eines zentralen Wertes jeder rechtlichen Ordnung*] alludes to the notions of infinity and totality as in the phenomenological account of the law of human dignity. Are values – directly evocative of ethics – to be subsumed under the totality of the legal order? The FCC delineated the latitude of the legislature to respond to the interruption of pregnancy and set requirements for the attainment of the ability to respond. Reaching a decision 'demands a total view of the constitutional norms and the value order contained therein' [*eine Gesamtschau des verfassungsrechtlichen Normenbestandes und der in ihm beschlossenen Wertordnung.*][1117]. The requisite of a 'total view', namely of exhaustive surveyance, in order to justify a decision re the standards and limits of legislative freedom of decision, presupposes that constitutional norms and the value

[1114] BVerfGE 39, 1 (43f.) ['[…] The opinion expressed in the Federal Parliament during the third deliberation on the *Statute to Reform the Penal Law*, the effect of which is to propose the precedence for a particular time 'of the right to self-determination of the woman which flows from human dignity vis-à-vis all others, including the child's right to life' (German Federal Parliament, Seventh Election Period, 96th Session, Stenographic Reports, p. 6492), is not reconcilable with the value order [*Wertordnung*] of the Basic Law.']
[1115] BVerfGE 39, 1 (13)
[1116] BVerfGE 39, 1 (36)
[1117] BVerfGE 39, 1 (36)

order contained therein can be surveyed. It becomes clear that the value order is rendered graspable through constitutional norms and, what is more – a heuristic remark – their textual form and doctrinal character; the therein-comprised ethics are subject to the totalizing vision of the Court as self. This points to the purpose served by subsuming ethics under totality structures, such as constitutional norms, in the practice of law.

The value order of the Basic Law, the ethics underlying the structuring of the Federal Republic of Germany, 'may be understood only in light of the historical experience and the spiritual-moral confrontation with the previous system of National Socialism.' [1118]. The motif of the evolving self evidenced in this observation appears in all cases explored in Chapter Two. According to the majority opinion, 'something missing' as a *Leerstelle* in the practice of the law of human dignity is to be imbued with meaning drawing on the historical context of the Basic Law.

> […] the Basic Law of the Federal Republic of Germany has erected an order bound together by values which places the individual human being and [his or her] dignity at the focal point of all of its ordinances. At its basis lies the concept, as the Federal Constitutional Court previously pronounced […], that human beings possess an inherent worth as individuals in the order of creation which uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially 'worthless,' and which therefore excludes the destruction of such life without legally justifiable grounds. This fundamental constitutional decision determines the structure and the interpretation of the entire legal order. Even the legislature is bound by it; considerations of socio-political expediency, even necessities of state, cannot overcome this constitutional limitation […]. Even a general change of the viewpoints dominant in the population on this subject if such a change could be established at all would change nothing. [1119]

Limitless dominion over all areas of social life as the distinctive trait of the omnipotent totalitarian National Socialist state brings forward the arbitrariness of freedom and the authority of the totality of vision over meaning as in *Totality and Infinity*. The totalitarian state functions as a rigid system that ignores the essential precedence of the social: 'prior to these systems, which are required to meet many needs, and presupposed by them is the existing individual and his ethical choice to

[1118] BVerfGE 39, 1 (67)
[1119] BVerfGE 39, 1 (67)

welcome the stranger and to share his world by speaking to him.'[1120] The social precedes the systematic. The systematic presupposes 'first freely making a choice for generosity and communication, i.e., for the social.'[1121] A hermeneutic and literary reading of the perception of the German Basic Law as a response to the historical background of the National Socialist state, which stripped human life of meaning, prompts the appreciation of the dramatic verb 'erected' [*hat [...] aufgerichtet*][1122], which emphasizes the stimulating willingness of the *pouvoir constituant* and the groundbreaking character of the establishment of 'an order bound together by values [*wertgebundene*] which places the individual human being and [his or her] dignity at the focal point of all of its ordinances […]'[1123].

The Basic Law order is depicted as a *sui generis* totality. The totality of the constitutional order is bound by values, hence has a foundational ethical component. The ethical is the transcendental; found, as proposed in the *Tractatus Logico-Philosophicus*, at the limit of the world, precisely where the metaphysical subject, the philosophical I, is positioned. The transcendental can only be 'shown', not 'said', in our world. However, as Wittgenstein admits of his own analysis in the *Tractatus Logico-Philosophicus*, propositions that grasp and utter 'nonsense', that is, 'say' what can only be 'shown', could, by analogy with a ladder, be put forward to assist our ascendance to an understanding of meaning. The ladder should then be discarded, argues Wittgenstein, to ensure the non-institution of a single such proposition totalizing our understanding. Throwing away the ladder is called for in critical reflection. This process is triggered and catalyzed by 'nonsensical', as in Wittgenstein's philosophy of language, propositions. The values comprised in the order of the Basic Law are propositions stating what cannot be 'said'. The *pouvoir constituant* and the *pouvoir constitué*[1124], necessarily made up of metaphysical subjects, engineered and proferred these values as embedded in the legal language games produced.

In *Totality and Infinity*, pre-ethics instituted in language as infinity are spelled out: hospitality, generosity and responsibility. These are not propositional concretizations of the transcendental; rather, the metaphysics of hospitality precede

[1120] Levinas, *Totality and Infinity,* 14-15 [Introduction by John Wild]
[1121] ibid
[1122] BVerfGE 39, 1 (67)
[1123] BVerfGE 39, 1 (36)
[1124] Schnapp (1989) 1, 1

ontology, that is, are presupposed by all propositions existing in the world. In that sense they enable building a ladder in the first place and disposing of it in a spirit of critical reflection attuned to the humane practice of law. Imprints of Levinas' pre-ethics are traced in the practice of the law of human dignity and fundamental rights. Transcendence is, at the same time, transascendance[1125]; this insight may elucidate the spatial figurative rendering of 'God' in the Preamble to the Basic Law. For the metaphysical subject, the perception and production of meaning is associated with ascendance and the traversal of a limit towards a higher point, hence transascendance. In light of such phenomenological insights the order of the Basic Law can be portrayed as a totality 'bound together by values' and premised on the pre-ethics set forth in *Totality and Infinity.* How is the nexus between totality and infinity as two sides of the same story depicted, more precisely, in the practice of law? Why has the totality of the Basic Law order been characterized as *sui generis*?

The order of the Basic Law by analogy with a totality structure 'places the individual human being and [his or her] dignity at the focal point of all of its ordinances.' The concept 'that human beings possess an inherent worth as individuals in the order of creation which uncompromisingly demands unconditional respect for the life of every individual human being' is foundational to the constitutional order, and 'determines the structure and the interpretation of the entire legal order'.[1126] The practice of the law of human dignity within the totality of the Basic Law order is marked by the *sui generis* coexistence of vision and language, the systematic and the social, as in the case of the ordering of values doctrine. The dual sense of 'something missing' is key to understanding how this coexistence operates.

Human dignity, the dignity of human beings *qua* beings is inviolable. The linguistic-analytical portrayal of the limit apropos the dual sense of 'something missing' turns to the symbolic meaning of tautological schemata as analyzed in the *Tractatus Logico-Philosophicus* and to the metaphysical subject as the limit of the world. The limit stands for the meaning, content and form, substance and function, of law's *Menschenbild* by analogy with the metaphysical subject; it signifies the inviolable position of human beings, a reminder of an ought[1127]. 'Something missing' as a *Leerstelle* corresponds to a concrete manifestation of human being-ness. The

[1125] The notion of height is also implied by the metaphor of ascending a ladder in the *Tractatus Logico-Philosophicus* (6.54)
[1126] BVerfGE 39, 1 (67)
[1127] Kunig, Art. 1, *GG Kommentar* (2012) para 1

legal guarantee of human dignity under Art. 1 sec. 1 GG protects unborn life in view of the prospect of its development from being subject to others' interests and sacrificed to serve others' ends[1128], and presupposes that a separate claim to human dignity corresponds to prenatal life.[1129] Responding to the claim to a part within the realm of law and the objective ordering of values of human beings that have no part requires plunging into the context of the *Leerstelle* with a view to ascertaining its meaning and depicting it through language. The phenomenological portrayal builds on the linguistic-analytical model.

iv. Inviolability and morality, the absolutely other, emptiness

Inviolability can be associated with the proposition of absolute otherness: the other can absolve him or herself from the relationship with the self, is thus inviolable. The tautological pattern of the definition of morality[1130] in *Totality and Infinity* reinforces the relation of the ethical to the limit. The absoluteness of the human dignity guarantee is exceptional in the order of the Basic Law. The law of human dignity is a Trojan horse within the totality of the German constitutional order. The possibility of escape from the totality is foreclosed even on occasion of socio-political expediency or necessities of state, or in the case of a general change of the viewpoints dominant in the population; these may bring about the fluctuation of the boundaries of the totality, but, cannot, alone, effectuate the crack that breaches it. Yet, due to the practice of the law of human dignity within it, the constitutional order exists as a totality to accommodate the infinity of human being-ness. Human dignity language incarnates the meaning of transcendence as transascendance. The dual sense of 'something missing' constitutes a crucial aspect of the meaning of the law of human dignity, of the *Menschnebild* of the Basic Law and of 'God' vis-à-vis human beings in the Preamble. Practicing the relational account of the law of human dignity amounts to deducing meaning from the unique happening of the face-to-face encounter with the other. 'Something missing' is presupposed by the institution of new meaning within legal language games on occasion of that encounter.

Infinity, 'the void that breaks the totality'[1131], an 'apparently wholly empty notion'[1132], signifies, furthermore, the processual aspect of the meaning of the law of

[1128] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 110
[1129] ibid
[1130] Levinas, *Totality and Infinity*, 245
[1131] ibid 40

human dignity. The dual sense of 'something missing' is the other side of the coin of the infinity of intersubjective space; it enables the development of that space within the totality structure of the order of the Basic Law. The law of human dignity is consciously subsumed under the totality of the Basic Law and its ordering of values[1133], although it has the capacity to effectuate a crack in the totalizing vision of the state as self and to transcend the boundaries of any given legal language game, thus undermining the uniformity, foreseeability, and clarity of meaning. The practice of the law of human dignity in legal language games, in that sense, signifies that law provides for the very language – and process – that can subvert it; this is precisely what I frame as the human practice of the law of human dignity or any law produced in that light.

v. Face-to-face encounters

The particularity of face-to-face encounters in the *Abortion I Decision* is attributable to the perplexity of tracing the human factor in three viewpoints within the legal language game: the judge, institution and human, the pregnant woman, and the unborn child. Different portrayals of the relation of viewpoints subject to the authority of the self over meaning are conceivable from the first-person point of view, namely the viewpoint of the speaking self, the Court. In one conceivable portrayal, the mother and the unborn child are both identified with the other, while in another the mother is depicted as self vis-à-vis the unborn and, at the same time, as other vis-à-vis the speaking self. For the purposes of this argument, the unborn child surfaces as the other in either one of the conceivable portrayals.

Essentially what needs to be further problematized is the portrayal of the pregnant woman. If the pregnant woman is just the other, as in the dissenting opinion, then the law of human dignity guarantees that the speaking self, in producing meaning, respects her radical alterity. The portrayal of this relation, which draws, as a hermeneutic and literary enterprise, on the entire content of the speaking self's legal language game, including *obiter dictum*, should reflect the self's respect for her radical alterity, regardless of the Court's decision on the arising human dignity v. human dignity conflict. If, as in the majority opinion, the pregnant woman is rendered at the same time as a self and the other, the constellation of relations within the legal

[1132] ibid
[1133] This subsumption is firmly established on Art. 101, 103, 104 GG

language game presents further complexities. As self and other, she is schooled at and 'reminded of' responsibilities deriving from her nature. In other words she, as the other, is directed by the speaking self as to how she should act as self towards the unborn child, the other. The speaking self could be heavily projecting the own morality on the other, while assuming – soundly or unsoundly – her viewpoint. The different phenomenological portrayals introduce us into the complexity of portraying and understanding this instance of practice of the law of human dignity, while signaling the need for critical reflection and how this activity should be astutely tailored to the alternative constellations of relations' dynamics within the legal language game.

The law of human dignity 'uncompromisingly demands unconditional respect for the life of every individual human being, even for the apparently socially 'worthless' […].'[1134] Life cannot be destructed 'without legally justifiable grounds'[1135]. Quantification of life cannot ground justifiability; the 'weighing in bulk of life against life' [*Die pauschale Abwägung von Leben gegen Leben*][1136], which may effectively permit the destruction of an ostensibly smaller group in the interest of preserving an allegedly larger sum, 'is not reconcilable with the duty of an individual protection of each single concrete life.'[1137] Human dignity is echoed in this observation. The interrelatedness of the legal guarantee of human dignity with the right to life features centrally in the text the *Abortion I Case.* Delineating the subjective scope of the right to life is critical to asserting whether and how unborn life should be protected in light of the Basic Law. The subjective scope of Art. 2 sec. 2 sent. 1 GG comprises 'everyone who 'lives'', permitting no distinctions 'between various stages of the life developing itself before birth, or between unborn and born life' and understanding 'everyone' as 'every life possessing human individuality'.[1138]

Developing life 'participates in the protection which Art. 1 sec. 1 GG guarantees to human dignity'[1139] and the state is under a duty to protect this life in line with Art. 1 sec. 1 sent. 2 GG. The Court contended that a distinction between various stages of development before birth is not possible and identified 'human individuality' as the decisive trait of human life, in other words pointed to uniqueness

[1134] BVerfGE 39, 1 (67)
[1135] BVerfGE 39, 1 (67)
[1136] BVerfGE 39, 1 (89)
[1137] BVerfGE 39, 1 (89)
[1138] BVerfGE 39, 1 (37)
[1139] BVerfGE 39, 1 (41)

as the defining quality of human being-ness. Uniqueness can be assocatiated with absolute otherness and separation in *Totality and Infinity*; the unattainability of a comprehensive understanding of the other, the unique, thus also strange, at least initially, human being, is the basis of the self's desire, and desire fuels the social.

> Where human life exists, human dignity is present to it [*'Wo menschliches Leben existiert, kommt ihm Menschenwürde zu'*]; it is not decisive that the bearer [*der Träger*] of this dignity [him or herself] be conscious of it and know personally how to preserve it. The potential faculties present in the human being from the beginning suffice to establish human dignity.[1140]

Human dignity and human being-ness are inextricably linked; human dignity 'is present to' human life, to wit, is manifested in the existence of human beings. From a literary analysis perspective, human dignity, being embedded in human life, immediately arises from the human image, the *Menschenbild*. Hence, its relation to human being-ness can be portrayed and perceived as a pictorial rather than representational event. Stressing the pictorial character of this coincidence, also evoked by the composed term *Menschenbild*, reinforces the primacy of the face-to-face encounter in practicing the law of human dignity; the self sees his or her human dignity in the face of the other human being.

The Court clarified, 'it is not decisive [*es ist nicht entscheidend*] that the bearer of this dignity him or herself be conscious of it and know personally how to preserve it.'[1141] The phenomenological portrayal shows that the Court takes a course different to that of voices in the theoretical discourse on who qualifies as a bearer of human dignity and on what grounds. Most paradigmatically, the *Leistungstheorie*, a theoretical stance provoking criticism and opposition in legal theoretical discourse,[1142] proposes a narrow definition of the bearer of human dignity that is a far cry from the Court's position.

Phenomenology, as defined by its founder Edmund Husserl, studies 'the essence of consciousness as experienced from the first-person point of view'[1143]. This analysis focuses on the self's consciousness of the other. In the statement under

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[1140] BVerfGE 39, 1 (41)

[1141] BVerfGE 39, 1 (41); Later the Court expanded on the decisiveness of the evolution of consciousness for the constitutional protection of prenatal and postnatal human life.

[1142] Discord as regards the *Leistungstheorie* is indicative of ambiguity and controversy about human dignity meaning; who the human being, the bearer of human dignity, is, is not self-evident, as argued in the ontological analysis.

[1143] David Woodruff Smith, *Husserl - The Routledge Philosophers* (London and New York: Routledge, Taylor & Francis Group, 2007) 1

scrutiny, the speaking self is the Court. More broadly, however, all manifested forms of the German constitutional state featuring in the text of the *Abortion I Case* can be portrayed as the self. In producing human dignity meaning in the *Abortion I Case*, the Court explained that consciousness of being a bearer of human dignity on the one hand, and personal knowledge as to how human dignity can be preserved on the other, are not decisive factors. For whom are these criteria 'not decisive'? The answer is, for the self.

The self's approach to the other as conveyed in the above excerpt can be understood in light of phenomenological insights presented in Chapter One as an act spurred by desire that 'feeds on itself'[1144], rather than need that seeks 'to fill a negation or lack in the subject'[1145]. Desire 'is positively attracted by something other not yet possessed or needed […]'[1146]. The distance between the self and the other as perceived from the first-person point of view is founded on conversation, goodness and desire[1147]. The Court's position under scrutiny effectively portrays the phenomenology of the practice of the law of human dignity in the majority opinion of the *Abortion I Case*. The negative delineatation of the bearer of human dignity in the Court's phrasing, namely not requiring consciousness and knowledge of how to preserve human dignity for the ascertainment that it is borne, permits the phenomenological portrayal of the speaking self. That the self discerns the manifestation of human dignity in the face of the other without requiring that the other perceives of it[1148] can be understood as goodness, generosity, and hospitality towards the other and is consistent with accepting the other's absolute separation.

Human dignity can be grounded on potentiality as an inherent quality of human being-ness; 'the potential faculties present in the human being from the beginning suffice to establish human dignity.' Potentiality is associated with the continuity of human being-ness. Guaranteeing human beings their continuity[1149] runs parallel to the unforced unfolding of human being-ness as presented in the ontological

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[1144] Levinas, *Totality and Infinity,* 16 [Introduction by John Wild]
[1145] ibid 19 [Introduction by John Wild]
[1146] ibid
[1147] ibid 39
[1148] In the case of unborn life this holds true in any event, because the unborn human being cannot perceive of his or her human dignity. The danger of paternalism inheres in most other cases where the self evaluates the appropriateness and permissibility of how the other perceives of him or herself as a human being and a bearer of human dignity and fundamental rights. The law of human dignity mediates the relationship between the self and the other and destroys the radical distance separating them in instances of paternalistic practice: the other is not perceived as absolutely Other.
[1149] Levinas, *Totality and Infinity*, 21

account of the law of human dignity. The dual sense of 'something missing' is an essential aspect of the meaning of potentiality. The unfolding of human beings perceived as a movement towards realizing their potential is a movement towards infinity, an 'apparently wholly empty notion'[1150] or 'something always missing'. The progressive development of human beings' potential institutes positively 'something – previously – missing'. The potential faculties being attained, 'something missing' as a *Leerstelle* is filled with concrete meaning. Potentiality as an aspect of human dignity meaning is illustrative of the correlation between 'something missing' and 'something always missing' in the practice of the law of human dignity.

The constitutional duty of the state as self to respect and protect the dignity of human beings can be interpreted as an expression of Levinas' pre-ethics. Prior to demonstrating where these positively determined pre-ethics can be traced, it is vital to draw attention to clues of practice of the dual sense of 'something missing'. Turning back, then, to Levinas' pre-ethics, the meaning, the importance of having pre-ethics positively uttered as in *Totality and Infinity* and the contribution of Levinas' language to an affirmative stance towards 'something missing' can be better appreciated.

Law's *Menschenbild* entails the dual sense of 'something missing' as it represent the human face within the realm of law. Law's *Menschenbild* trails the meaning of the concept of human dignity and, vice versa, the legal guarantee of human dignity under Art. 1 sec. 1 GG assumes the dual sense of 'something missing'. The practice of human dignity in legal texts stands for the occasion of a face-to-face encounter with the other. According to the Court, the particulars of human life, 'the vital basis of human dignity and the prerequisite of all other fundamental rights'[1151] and an ultimate value within the order of the Basic Law, that is, within a totality structure, need not be established [*night näher begründet warden muss*]. Similarly, the *Menschenbild* of law need not be concretized. 'something missing' and 'something always missing' allow for the face-to-face encounter, the relational, phenomenological meaning of practicing the law of human dignity, to effectuate.

Different manifestations of state power are represented in the text of the *Abortion I Case*. Where in that text can we trace the face-to-face encounter between the self and the other? The Federal Minister of Justice, in an opinion submitted on behalf of the Federal Government, noticed the disparity between relationship of the

[1150] ibid 50
[1151] BVerfGE 39, 1 (42)

child *en ventre sa mere* to the mother as a natural phenomenon and its portrayal within the realm of law. The Federal Minister of Justice argued against the compulsory and uniform penalization of the interruption of pregnancy in view of the history of the origin of Art. 2 sec. 2 sent. 1 GG, and the observation that 'the point at issue […] is neither attacks by the state nor defense against attacks by third parties because the relationship of the child *en ventre sa mere* to the mother is of a special kind.'[1152] In other words, the representative of the executive branch of state power resisted the institution of rigid totality structures for dealing with the interruption of pregnancy.

> [...] the child *en ventre* sa *mere* is united with the body and the life of the mother in the most intimate manner conceivable. Nature has already placed the protection in the direct care of the mother. The possibilities for the legal order to protect unborn life even against the mother are limited by the nature of the situation. Penal, according to previous experience, can only induce pregnant women to bearing the child to term in a limited measure, if the willingness is not already present. The duty to protect, therefore, cannot establish for the state a thoroughgoing duty to punish. With the withdrawal of the penal sanction for an interruption of pregnancy in the first weeks of pregnancy the state does not bestow upon the mother a right to the operation. The legislature merely limits the penal sanction with reference to the fact that other arrangements for protection would be seen as more appropriate and effective or to take account of interests of the pregnant woman which are worthy of protection. [1153]

The Federal Minister of Justice sought to clarify a range of considerations raised in the abortion discourse. The juxtaposition of how the unborn child, the other, is conceived in law, namely as 'an intrinsic legal value', with how it actually exists in life, that is, attached to the body and the life of the mother 'in the most intimate manner conceivable' is illustrative of the chasm between two different perspectives, hence also between two fields of sight. Only the pregnant woman can respond as self to the unborn child as the other, because nature 'has already placed the protection in the direct care of the mother'. The intimacy and directedness of the relationship of the child *en ventre sa mere* to the mother are elements of the portrayal ensuing from the above excerpt. The 'nature of the situation' limits the legal order as regards interventions aiming at the protection of unborn life against the mother. The relationship of the child *en ventre sa mere* to the mother could perhaps be understood

[1152] BVerfGE 39, 1 (24f.)
[1153] BVerfGE 39, 1 (25)

as *sui generis* social if we consider potentiality sufficient a basis for establishing the social, despite the impossibility of a face-to-face encounter in language; in any the case the nature of this relationship cannot be reconciled with the notion of totality and the order of systems.

Ultimately, the authority over meaning belongs by nature to the pregnant woman. The limited effectiveness of penal measures 'if the willingness [of the mother] is not present' is empirically verified, and this expression of the state as self, Federal Minister of Justice, demonstrated readiness to listen and learn from experience. The appreciation of the decisiveness of the willingness of the pregnant woman apropos averting the interruption of pregnancy suggests that the Federal Minister of Justice as self views her as an absolute, that is, absolving, other. In directing the legislature with respect to how it should approach the subject matter before it, the Federal Minister of Justice laid out an understanding of the gravity of this situation of conflict for the pregnant woman as the other, and noted 'that the decision for an interruption of pregnancy as a rule […] is made in the depths of the personality.'[1154]

> A penal provision, therefore, would not be able regularly to reach women inclined to, or ready for, an interruption of pregnancy. [1155]

On those grounds the Federal Minister of Justice stated that 'the duty to protect', which translates in phenomenological terms into a duty to give a responsible answer to the other, 'cannot establish a thoroughgoing duty to punish.'[1156] Punishment is not foreclosed as a possible responsible answer; it is the totality of a 'thoroughgoing' duty to punish that this manifestation of the state as self opposes to. A further clarification, that 'withdrawal of the penal sanction […] does not bestow upon the mother a right to the operation […]'[1157], demonstrates an effort on the part of this self to prevent confusion over meaning or unattended to conclusions re the implications of an action. This effort to clarify meaning, which constitutes *per se* an indication of strife to demonstrate ability to respond, appears in the identification of the motives of the legislature, as another manifestation of the self, in limiting the

[1154] BVerfGE 39, 1 (26)
[1155] BVerfGE 39, 1 (26f.)
[1156] BVerfGE 39, 1 (25)
[1157] BVerfGE 39, 1 (25)

penal sanction in the statute under scrutiny. 'Why' is the legislature 'speaking'[1158] the way it does in this statute? Because, as the opinion of the Federal Minister of Justice conveyed, penal sanctions do not always amount to a responsible answer to the pregnant woman undergoing abortion. Other arrangements 'would be seen as more appropriate and effective' [*geeigneter und wirksamer*][1159]. Appropriateness and effectiveness surface in the text of the *Abortion I Case* as defining standards of responsibility, that is, the ability to respond to the other.

> No more extensive requirement for the structuring of the general legal order can be inferred as a matter of principle from Art. 2 sec. 2 sent. 1 GG than that of guaranteeing appropriate and effective protection of unborn life. [1160]

The inquiry into the most appropriate and effective measures is composed of common sense assertions and empirical insights. An appeal to common sense is traced in the conditional, 'if a woman should consider an interruption of pregnancy in spite of the risk of her own health or indeed her own life, a situation is presented which would require a program of counseling and assistance.'[1161] Counseling and assistance have the prospect of bringing to bear the responsibility towards the pregnant woman as appropriate and effective measures, 'since many of these women still vacillate in their decision and have definitely not decided upon an interruption of pregnancy from the beginning.'[1162] Counseling essentially entails a face-to-face encounter with the other and alludes to the infinity of intersubjective space in the thought of Levinas. Counseling, argued the Federal Minister of Justice, can cultivate a positive stance towards pregnancy in the woman. The humanism of law orients counseling towards a concrete goal: '[t]hat the counseling must be directed to the continuation of the pregnancy is clear.'[1163] The opinion reacted against the thoroughgoing threat of punishment and the expert opinion required by the regulation of indications; these can be portrayed as totalities that respectively weaken the effectiveness of counseling and harm the direct and straightforward participation of the pregnant woman in the

[1158] Levinas, *Totality and Infinity,* 18 [Introduction by John Wild]
[1159] BVerfGE 39, 1 (25)
[1160] BVerfGE 39, 1 (24)
[1161] BVerfGE 39, 1 (27)
[1162] BVerfGE 39, 1 (27)
[1163] BVerfGE 39, 1 (28)

counseling process[1164] as a face-to-face encounter. From a phenomenological perspective, this expression of the state as self clearly favored approaching the other in responsibility, hospitality and generosity, rather than subsuming the other under rigid totality structures and the impersonal neutrality of expert opinions.

The Federal Minister of Justice called for respect for the personal responsibility of pregnant women. A value decision giving support to the personal responsibility of the pregnant woman would be of 'decisive constitutional meaning'[1165]. The legislature would ground the regulation of this area of life on the natural responsibility of the woman for her child *en ventre sa mere.* Regulations attuned to the natural responsibility convey correspondence between law and nature. The phenomenological significance of the 'constitutional meaning' produced is evident in the allusion to the legislature as the self, as the one who must speak in order for that meaning to eventuate. The role of the legislature as a manifested form of state power is to survey all legal positions and bring them into balance 'in the face of the reciprocally influencing and limiting value decision and fundamental rights.'[1166] From a phenomenological point of view, the legislature as the self is expected to consider diverse legal responses emanating from the viewpoint of other selves, and to counterbalance them. The Federal Minister of Justice concluded that the regulation of terms of the *Fifth Statute to Reform the Penal Law* was compatible with Art. 2 sec. 2 sent. 2 GG, and that addressing the social phenomenon of abortion, namely responding to human beings involved, with the counseling of pregnant women during the first twelve weeks of pregnancy 'guarantees even without penal sanction, the necessary protection of unborn life.'[1167]

The Court turned to the explanations provided by the representative of the Federal Government in the deliberations of the Special Committee for the Reform of the Penal Law for the justification of the indications in the statutory provision.

[1164] BVerfGE 39, 1 (27) ['A thoroughgoing threat of punishment even for the first period of pregnancy as it is proposed in the regulations for indications decisively weakens the effectiveness of the counseling and offers of assistance. Since a regulation of indications inevitably presupposes in a certain form a system of expert opinion, it subjects the pregnant woman to the compulsion of abiding by this expert opinion. This, however, would be harmful to a candid participation of the pregnant woman in the counseling and would frequently lead in the cases of women inclined toward and ready for abortion to the result that the path to counseling and to the expert opinion center would be avoided from the beginning.']
[1165] BVerfGE 39, 1 (26)
[1166] BVerfGE 39, 1 (26)
[1167] BVerfGE 39, 1 (26)

> The decisive viewpoint [*Der entscheidende Gesichtspunkt*] is that in all of these cases another interest equally worthy of protection, from the standpoint of the constitution [*vom Standpunkt der Verfassung*], asserts its validity with such urgency that the state's legal order cannot require that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn. [1168]

A phenomenological portrayal of the relation between the self and the other as manifested in the above excerpt demonstrates the exceptional complexity confronted in the *Abortion I Case* decision. The speaking self, the Court, and, more generally, the state as self is under a duty to protect developing life. In certain indicated cases, the pregnant woman as the other and the Other calls into question, merely by being present, the spontaneity of the self[1169]. This is what Levinas names ethics[1170]. The urgency of the circumstances constitutes a crucial element of the portrayal. The indications evoke images and narratives that reinforce the justification of recognizing, in the instance of a pregnant woman experiencing the burden, an interest equally worthy of constitutional protection[1171]. The other, the human being under extraordinary burden, calls into question the same, namely the portrayal emanating from the requirement 'that the pregnant woman must, under all circumstances, concede precedence to the right of the unborn.' Upholding the constitutional relevance of the interest of the pregnant woman under such urgent circumstances despite its implications for the precedence to the right of the unborn signifies the commitment to *ad hoc* production of meaning 'from the standpoint of the constitution'. [1172]

The life of the unborn child is protected as an intrinsic legal value in line with Art. 2 sec. 2 sent. 1 GG[1173]. The majority of the FCC claimed that there are no clearly discernible lines separating the various stages of development of human life[1174]. Significant steps in the process of development, such as the phenomena of

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[1168] BVerfGE 39, 1 (50)
[1169] Levinas, *Totality and Infinity*, 43
[1170] ibid
[1171] According to feminist legal theorist Robin West 'the function of literature is to produce a virtual experience in the reader; and the truth of that experience lies in the reader's empathic response rather than in correspondence to any actual event. […] not of what occurred, but of what such an occurrence would feel like.' In Binder & Weisberg, *Literary Criticism of Law* (2000) 182, citing Robin West, 'Authority, Autonomy and Choice: The Role of Consent in the Jurisprudence of Franz Kafka and Richard Posner' (1985) 99 *Harvard Law Review* 384
[1172] BVerfGE 39, 1 (50)
[1173] BVerfGE 39, 1 (36)
[1174] BVerfGE 39, 1 (37)

consciousness 'which are specific to the human personality'[1175], appear for the first time after birth. The subjective scope of protection of Art. 2 sec. 2 sent. 1 GG can therefore not 'be limited either to the 'completed' human being after birth or to the child about to be born which is independently capable of living.'[1176] The FCC argued that 'the sense and purpose of this provision of the Basic Law'[1177] demand the extension of that protection to the life developing itself *en ventre sa mere*[1178]; otherwise, 'the security of human existence against encroachments by the state would be incomplete'[1179].

Portraying the child, the other, as 'an independent human being who stands under the protection of the constitution'[1180] denotes, argued the FCC, the social dimension to the interruption of pregnancy. Abortion is a phenomenon of social life that 'raises manifold problems of a biological, especially human-genetic, anthropological, medical, psychological, social, social-political, and not least of an ethical and moral-theological nature, which touch upon the fundamental questions of human existence.' [1181] The social character of abortion renders it 'amenable to and in need of regulation by the state.'[1182] The FCC demonstrated awareness of the multifarious considerations associated with abortion. Appreciation of the social phenomenon under scrutiny led the Court to assert that regulation was required. In his introduction to Levinas' *Totality and Infinity,* John Wild observes, 'prior to these systems, which are required to meet many needs, and presupposed by them'[1183] one finds the human factor and the ethical choice to engage in a face-to-face encounter with the other. The social precedes the systematic; at the same time, it calls for the systematic. Systems as totality structures serve the need to render the social somehow graspable. The right of the woman to the free development of her personality 'can also, it is true, likewise demand recognition and protection.'[1184]

[1175] BVerfGE 39, 1 (37)
[1176] BVerfGE 39, 1 (37)
[1177] BVerfGE 39, 1 (37)
[1178] BVerfGE 39, 1 (38) ['This extensive interpretation corresponds to the principle (*Grundsatz*) established in the opinions of the Federal Constitutional Court, 'according to which, in doubtful cases, that interpretation is to be selected which develops to the highest degree the judicial effectiveness of the fundamental legal norm' [cited cases omitted].']
[1179] BVerfGE 39, 1 (37)
[1180] BVerfGE 39, 1 (42)
[1181] BVerfGE 39, 1 (36)
[1182] BVerfGE 39, 1 (42)
[1183] Levinas, *Totality and Infinity,* 14-15 [Introduction by John Wild]
[1184] BVerfGE 39, 1 (43)

The standard for a responsible answer to the unborn child as the other in the *Abortion I Case* is the effectiveness of protection. The Court as the speaking self deferred to the legislature as the state power under the duty to ensure the effective protection of developing life[1185]. How the duty to effectively protect the unborn child is fulfilled 'is, in the first instance, to be decided by the legislature.'[1186] In presenting the syllogism that led it to decide which response abides by the standard of effective protection, the Court extensively discussed the issue of the penalization of abortion, noting, 'the guiding principle of the precedence of prevention over repression is […] valid particularly for the protection of unborn life [cited cases omitted].'[1187] The speaking self, the FCC, directed the state 'to employ, primarily, social, political, and welfare means for securing developing life […]'[1188] in exercising authority over meaning as self. The legislature was deemed the competent and responsible state actor with respect to the particulars of assistance measures.

Turning to the responsibility towards the pregnant woman, the Court considered strengthening 'readiness of the expectant mother to accept the pregnancy as her own responsibility and to bring the child *en ventre sa mere* to full life' [1189] to be the 'primary concern'.

> Regardless of how the state fulfills its duty to protect [*Bei aller Schutzverpflichtung des Staates*], it should not escape our attention that developing life itself is entrusted by nature in the first place to the protection of the mother. To reawaken and, if required, to strengthen the maternal duty to protect, where it is lost, should be the principal goal of the endeavors of the state for the protection of life [*Den mütterlichen Schutzwillen dort, wo er verlorengegangen ist, wieder zu erwecken und erforderlichenfalls zu stärken, sollte das vornehmste Ziel der staatlichen Bemühungen um Lebensschutz sein.*]. Of course, the possibilities for the legislature to influence are limited. [1190]

Law's confrontation with nature is one of the central thematic axes in the *Abortion I Case*. The FCC treated this clash differently than the Federal Minister of Justice in the submitted opinion (see *supra*)[1191]. The state, in particular the legislature

[1185] BVerfGE 39, 1 (44)
[1186] BVerfGE 39, 1 (44)
[1187] BVerfGE 39, 1 (44)
[1188] BVerfGE 39, 1 (44)
[1189] BVerfGE 39, 1 (45)
[1190] BVerfGE 39, 1 (45)
[1191] In the opinion of the Federal Minister of Justice, awareness of the limited possibilities of state influence led the self to understand the pregnant woman as an absolute other, and to allow her to

as an expression of the state with competence and responsibility to respond, can exert only limited influence on the decision of the pregnant woman and, more generally, on the evolution of events, due to the nature of this concretization of human being-ness. The mother is entrusted by nature with the responsibility to protect the life developing in her womb. What amounts to responsible answer on the part of the state to the pregnant woman according to the FCC? While admitting that the nature of the situation renders the effectiveness of state intervention limited, the FCC understood the meaning of the duty of the state to protect to be '[t]o reawaken and, if required, to strengthen the maternal duty to protect, where it is lost'[1192].

The duty of the state, in the Court's view, is to protect the fundamental right to life of developing life on the one hand, and to stimulate the duty of the pregnant woman to protect the unborn child on the other. From a phenomenological perspective, the speaking self demanded of the pregnant woman, as the other and at once the critical – by nature – self vis-à-vis the unborn child, to produce certain meaning and tailor her conduct accordingly. An analogy was drawn in Chapter One between the absolute guarantee of human dignity under Art. 1 sec. 1 GG and the Levinas' position that the absolutely other cannot be subsumed under the totality of the vision of the self, which may be established on mediating concepts, but rather 'escapes [the] grasp'[1193] of the self by not being 'wholly in [the self's] site'[1194]. Is the enterprise of reawakening and strengthening the maternal duty to protect, where ostensibly lost, compatible with the law of human dignity understood as a guarantee of the ability of the other to absolve him or herself from the relation with the self? The desideratum is not a clear-cut response to this question, which, in any event, does not fall within the scope of the present study; rather, the phenomenological portrayal of this issue in the Court's reasoning hints at the necessity of and sets the stage for critical reflection.

What is, usually, framed as the problem of state paternalism can be rendered, from a phenomenological perspective, as a concern about whether seeking to mold the very viewpoint of the pregnant woman and to influence her willingness impairs her

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absolve from state intervention in the form of legal consequences to the extent permissible by other conflicting interests.

[1192] BVerfGE 39, 1 (45); See also BVerfGE 39, 1 (52f.) ['It is constitutionally permissible and to be approved if the legislature attempts to fulfill its duty to improve protection of unborn life through preventive measures, including counseling to strengthen the personal responsibility of the woman.']

[1193] Levinas, *Totality and Infinity*, 39

[1194] ibid

absolute otherness. Comparing the argumentation of the FCC to that of the Federal Minister of Justice apropos how these proceed from the realization of the limited influence that the legislature can exert on decisions subject to the sphere of natural maternal responsibility unveils two disparate appreciations of the other. For the Federal Minister of Justice, the natural responsibility of the pregnant woman corresponds to 'something missing', that is, an empty space within the realm of law, as perceived from the point of view of the state looking through the law on abortion. Within the realm of law, what could the concrete content of this *Leerstelle* be? In light of Levinas' phenomenology, the other, at present the pregnant woman, can be encountered, on an *ad hoc* basis, in responsibility and hospitality. The self inquires into, listens, and learns from lived experience, rather than assuming and totalizing. Still, the intimacy of this relationship might limit the possibility for the self to survey. The affinity of the nature of this relationship to facets of human being-ness renders the experience of maternal responsibility an infinitely empty space, 'something always missing', to be filled only *ad hoc* as a *Leerstelle* ('something missing').

Critical reflection zooms in on the range of assumptions about the other, her viewpoint and circumstances. Are these assumptions and their premises sufficiently attended to? Reawakening implies that what should be – naturally – manifested is dormant; strengthening implies a weakness of will, or a will 'lost'. Motherhood, maternal duty, pregnancy are portrayed as neutral and impersonal signifiers under the grasp of the self. Assuming *a priori* the viewpoint of the other human being forecloses the very possibility of a face-to-face encounter and of human community as a relation 'instituted by language'[1195]. Conversely, if who the other is, is deduced from a face-to-face encounter, then the demonstration of the sources of insights into the lived experience of the other and the methods for assessing those afford this understanding of the other soundness. Knowledge of the other 'would be the suppression of the other by the grasp'[1196]. According to Levinas, if the movement of metaphysics leads to the transcendent being as such, namely the human being, 'transcendence means not appropriation of *what is*, but its respect'[1197].

This analysis does not thoroughly oppose reawakening or strengthening the willingness of the mother to bear the child to full term; rather, I insist on the need to

[1195] Levinas, *Totality and Infinity*, 213-214
[1196] ibid 302
[1197] ibid

expose how the reawakening and strengthening shall be prompted to critical reflection in view of the implications of invasive means, for instance penal measures, for the accomplishment of law's humanism. The FCC criticized statutory measures introduced by the legislature as 'frequently only indirect and effective only after completion of the time-consuming process of comprehensive education and the alteration in attitudes and philosophies of society achieved thereby'. However, the shift in statutory law may be understood as the upholding of non-coercive, unforced change of an individual or collective – in the case of society – self who is led to discover 'the famous naïvité of its thought, which thinks 'straight on' as one 'follows one's nose'.'[1198]

Approaching the pregnant woman through a sociological lens, the Court observed that the implications of pregnancy 'often mean a considerable change of the total conduct of life and a limitation of the possibilities for personal development […]'[1199], and acknowledged that '[t]he right to life of the unborn can lead to a burdening of the woman[1200] which essentially goes beyond that normally associated with pregnancy.'[1201] The word 'normally' [*normalerweise*] occasions an opportunity for critical reflection. Again, the distinction between the burden normally associated with pregnancy and excesses appears to be self-evident for the Court. The standard for assessing responsibility towards the other, namely whether not compelling the pregnant woman to bear the child to term is justified, is 'reasonableness' [*Zumutbarkeit*][1202]. The question of reasonableness is 'the question of whether the state, even in such [excessive burden], may compel the bearing of the child to term by means of penal law.' [1203] From a phenomenological perspective, the critical question is whether, first, compelling the bearing of the child and, second, doing so by means of penal measures totalizes the other, the pregnant woman, and impairs her absolute otherness.

Tackling the conflict between respect for unborn life and for the right of the woman not to be compelled 'to sacrifice the values in her own life in excess of a

[1198] Levinas, *Totality and Infinity*, 37
[1199] BVerfGE 39, 1 (48)
[1200] BVerfGE 39, 1 (48) ['This burden is not always and not completely balanced by a woman finding new fulfillment in her task as mother and by the claim a pregnant woman has upon the assistance of the community (Art. 6 sec. 4 GG). In individual cases, difficult, even life-threatening situations of conflict may arise.']
[1201] BVerfGE 39, 1 (48)
[1202] BVerfGE 39, 1 (48)
[1203] BVerfGE 39, 1 (48)

reasonable measure in the interest of respecting this legal value'[1204] requires, argued the FCC, the exercise of special restraint on the part of the legislature. Special restraint, that is, maintenance of the absolute separation from the other, is called for in view of the difficulty of 'an unequivocal moral judgment' on the issue, and the realization that 'the decision for an interruption of pregnancy can attain the rank of a decision of conscience worthy of consideration.' [1205] Not forcing the pregnant woman to sacrifice the values in her own life on account of respect for the legal value of unborn life means, in phenomenological terms, not provoking the interruption of her continuity by bringing her in a position where she no longer recognizes herself.

The practice of the law of human dignity as in the Basic Law constituting the legal order of the state, whilst a totality, allows for – if not embodies – the calling into question of the same by the other. The FCC introduced the standard of unreasonableness and recognized the latitude of the legislature to leave free of punishment other cases of comparably extraordinary burdens for the pregnant woman. From a phenomenological perspective, the legislature as the self is granted a fluency in engaging in a face-to-face encounter with the other: 'metaphysics, transcendence, the welcoming of the other by the same […] as the ethics that accomplishes the critical essence of knowledge.'[1206] The emphasis on urgency, from a hermeneutic and literary perspective, can be understood as an element of the portrayal of the pregnant woman who struggles with inner conflicts or faces an unreasonably weighty burden of, or analogous to, those indicated.

In encountering the pregnant woman as the other, the FCC noticed that her general situation and that of her family 'can produce conflicts of such difficulty that, beyond a definite measure, a sacrifice by the pregnant woman in favor of the unborn life cannot be compelled with the means of the penal law.' [1207] The Court asserted that the general emergency or social indication as statutory response to the other should meet certain requirements in the practice of the law of human dignity and fundamental rights as the practice of responsibility. The gravity of the social conflict justifying the non-punishment of an interruption of pregnancy should 'be clearly recognizable'[1208] and should be compatible 'from the point of view of

[1204] BVerfGE 39, 1 (48)
[1205] BVerfGE 39, 1 (48)
[1206] Levinas, *Totality and Infinity*, 43
[1207] BVerfGE 39, 1 (49)
[1208] BVerfGE 39, 1 (50)

unreasonableness'[1209] with the other indicated cases. The 'clearly recognizable' presupposes that the conflict is clearly illustrated. The legislature has the latitude to remove 'genuine cases of conflict of this kind from the protection of penal law'[1210] without thereby violating the duty of the state to protect life.

Merely inquiry into and certification of an occasion of grave social conflict, in other words 'the statutory prerequisites for an abortion free of punishment', does not necessarily satisfy the duty originating in the law of human dignity and fundamental rights to respond to the other responsibly. Rather, added the FCC, 'the state will also be expected to offer counseling and assistance with the goal of reminding pregnant women of the fundamental duty to respect the right to life of the unborn, to encourage her to continue the pregnancy and – especially in cases of social need – to support her through practical measures of assistance.'[1211] Generosity, hospitality and service to the other as in Levinas' phenomenology – even more so in cases of 'social need', that is, vulnerability are conveyed in the requirements of counseling and assistance.[1212] Morality, as construed in *Totality and Infinity,* can be parallelized to human dignity. Responding to a vulnerable human being with the means required by the particularities of her condition, for instance 'with practical measures of assistance' to encourage bringing the child to full term, evokes the notion of morality and, to extent that abortion, as portrayed by the Court, is a social phenomenon and a matter to be addressed by a network of members of society, conveys solidarity and fraternity.

Counseling and assistance serve the goal of 'reminding pregnant women of the fundamental duty to respect the right to life of the unborn' [*die Schwangere an die grundsätzliche Pflicht zur Achtung des Lebensrechts des Ungeborenen zu mahnen*][1213]. This proposition calls for critical reflection. 'Reminding' [*mahnen*] the pregnant woman of a fundamental duty, which, as noticed earlier in the text, is 'natural'[1214], could be signifying a paternalistic stance that destroys the distance between the self and the other. As noted *supra*, the choice of language implies the dormant state of the natural maternal duty. Can the self understand an experience involving the other's most intimate sphere of human being-ness to an extent that justifies assumptions about the reasons underlying the intention to interrupt the

[1209] BVerfGE 39, 1 (50)
[1210] BVerfGE 39, 1 (50)
[1211] BVerfGE 39, 1 (50)
[1212] BVerfGE 39, 1 (50)
[1213] BVerfGE 39, 1 (50)
[1214] BVerfGE 39, 1 (26)

pregnancy? In that respect, the didactic tone associated with 'reminding' the pregnant woman of her 'fundamental duty' begs critical reflection in light of the phenomenological interpretation of the absolute law of human dignity. Awareness of the transformation experienced by the pregnant woman is articulated elaborately in the dissenting opinion discussed *infra*. Could 'reminding' the other of a duty that originates in the intimate and individual-related experience of pregnancy be redundant or irrelevant an enterprise?

> In all other cases the interruption of pregnancy remains a wrong deserving punishment: since, in these cases, the destruction of a value of the law of the highest rank is subjected to the unrestricted pleasure of another and is not motivated by an emergency.[1215]

The 'unrestricted pleasure of another' can be parallelized to the enjoyment involved in the egoism of the self's existence[1216]. The primary experience of the self is 'definitely biased and egocentric'[1217], the 'primordial experience of enjoyment (*jouissance)*'[1218]. The majority of the Court as the speaking self moderates the relationship between the pregnant woman as another self and the child *en ventre sa mere* in view of the Basic Law. The pregnant woman is, for the majority, the self vis-à-vis the unborn child as other by nature, not necessarily however at the level of law. The Basic Law introduces mediating concepts for conciliating conflicting interests within that relation. The question is, from a phenomenological viewpoint, whether these concepts leave the distance between the two parties intact or, in fact, subsume them under a totality, destroy the distance, and objectify them. If the meaning of mediating concepts institutes, conversely, the possibility of conversation between the self and the other, then the moderation of that relation effectively grants the other as Other a right over the egoism of the self[1219], hence, far from impeding, guarantees radical separation. On the other hand, the question that shakes the foundations of the Court's argument from both an ontological and a phenomenological perspective is whether one can, and therefore also should, distinguish between a self and an other in the relationship of the child *en ventre sa mere* with the mother, minding that it constitutes a *sui generis* concretization of human being-ness and, accordingly, of

[1215] BVerfGE 39, 1 (50f.)
[1216] Levinas, *Totality and Infinity*, 40
[1217] ibid 12 [Introduction by John Wild]
[1218] ibid
[1219] ibid 40

law's *Menschenbild*. Could we conceive of the pregnant woman and the unborn child as a union that makes it impossible to distinguish between the self and the other?

The incapability of developing life to practice language accounts for a further particularity of the case of abortion; the critical traits of the human being-ness of the unborn as portrayed in the majority opinion in the *Abortion I Case* are potentiality and continuity. In safeguarding a right of the unborn child, the other, over the portrayed egoism of the pregnant woman, a self, and maintaining the distance between them, the vulnerability[1220] of developing life cannot be ignored. That the decision of the pregnant woman can cause 'the destruction of a value of the law of the highest rank' calls for limits on the arbitrariness of her freedom. Freedom cannot remain 'uncriticized'[1221] and needs to be tempered with justice[1222]. The infinity of the arbitrariness of freedom is subordinated[1223] 'in welcoming the Other'[1224], that is, in hospitality, the gist of the phenomenological account of the law of human dignity.

The constitutional concepts mediating the relation of the child *en ventre sa mere* to the mother and practiced by the Court as moderator in the *Abortion I Case* provide for the subordination of the self to the other as Other in hospitality. Levinas notes that '[i]n welcoming the Other I welcome the On High to which my freedom is subordinated.'[1225] Hospitality is grounded on 'the personal work of my moral initiative […], in the attention to the Other as unicity and face […], and not as egoism refusing the system which offends it.'[1226] Hospitality in the thought of Levinas cannot be contingent – exclusively – on systems, that is, either positively instituted by totality structures or negatively defined as a reaction to those, hence presupposing them. The constitutional concepts mediating the relation of the child *en ventre sa mere* to the pregnant woman should guarantee the practice of the pre-ethics of hospitality, that is, the foundations of law's humanism at the level of language. This understanding, I grant, relies entirely on the construing of such concepts as vessels of the

[1220] ibid 245 ['The accomplishing of the I qua I and morality constitute one sole and same process in being: morality comes to birth not in equality, but in the fact that infinite exigencies, that of serving the poor, the stranger, the widow, and the orphan, converge at one point of the universe. Thus through morality alone are I and the others produced in the universe.']
[1221] ibid 15 [Introduction by John Wild]
[1222] ibid 303
[1223] ibid 300
[1224] ibid
[1225] ibid
[1226] ibid

transcendental, embodiments of infinity, of an understanding of the other as Other, of the possibility of an encounter with the 'On High' in the words of Levinas.

Confronting reality, the FCC resorted to empirical knowledge on the motives underlying the decision to undergo abortion. It observed that 'many women who have previously decided upon an interruption of pregnancy' had no reason 'which is worthy of esteem within the value order of the constitution'[1227] and were not accessible to a counseling in line with § 218c sec. 1 StGB. These women, noted the Court, are not led to the decision to interrupt the pregnancy by 'material distress' or 'a grave situation of emotional conflict' [*seelischen Konfliktsituation*][1228]. Rather, they undergo abortion 'because they are not willing to take on the renunciation and the natural motherly duties bound up with it.'[1229]. As a result, developing life 'is abandoned without protection to their arbitrary decision […]'[1230]. In this excerpt, the arbitrariness of freedom, noticed in *Totality and Infinity*, is directly alluded to. The crucial question raised *supra* is repeated here: Whether the mother can be viewed as a totalizer self vis-à-vis her unborn child, the other, should be critically reflected on in light of the natural, physical embodiment of developing life in the womb of the pregnant woman. Can the unique expression of human being-ness in the relation of the child *en ventre sa mere* to the mother be portrayed as the coexistence of a self, who can totalize, and the other, who 'is abandoned without protection'?

vi. Self-reflection, the evolving self, the sphere-portrayal of absolute separation, responsibility towards the other (Dissenting opinion)

The dissenters agreed with the majority that the decision is 'a matter of legislative responsibility', stating, however, that '[u]nder no circumstances can the duty of the state to prescribe punishment for abortion in every stage of pregnancy be derived from the constitution.'[1231] Representing another voice within the Court, another face of the speaking self, the dissenters claimed that the legislature should be able to regulate equally the counseling and term solution measures and the indications solution. The

[1227] BVerfGE 39, 1 (55f.)
[1228] BVerfGE 39, 1 (56)
[1229] BVerfGE 39, 1 (56); ibid ['They have serious reasons for their conduct with respect to the developing life; there are, however, no reasons which can endure against the command to protect human life. For these women, pregnancy is reasonable in line with the propositions reiterated above. The behavior even of this group of women, legitimatized by law through the absence of a constitutionally important motive for the interruption of pregnancy, is fully covered under §218a of the Fifth Statute to Reform the Penal Law.']
[1230] BVerfGE 39, 1 (56)
[1231] BVerfGE 39, 1 (69)

separate opinion contributes to an internal self-reflection of the Court and to self-reflection among the branches of state power. The dissenters revisited the authority of the FCC 'to annul the decisions of the legislature' and argued that it 'demands sparing use' [*erfordet einen sparsamen Gebrauch*][1232] to avoid imbalance between the constitutional organs.

Constitutional review and the principle of the separation of powers can be understood as a self-reflection mechanism of the state; the operation of this mechanism requires judicial self-restraint 'which is designated as the 'elixir of life' [*'Lebenselexier'*] of the jurisprudence of the Federal Constitutional Court'[1233]. In self-reflection, the I (*idem*), the same, encounters alterity and either absorbs it into the self (*ipse*), or maintains sameness. This process presupposes a distance between the same and the other and judicial self-restraint signifies the commitment to the maintainance of that distance. Judicial self-restraint is vital in the practice of fundamental rights particularly 'when involved is not a defense from overreaching by state power but rather the making, via constitutional judicial control, of provisions for the positive structuring of the social order for the legislature which is directly legitimized by the people.'[1234] The democratic foundations of the constitutional order legitimize the subjection of human beings to the totality structure of the Basic Law. This totality is self-imposed, namely originates in the practice of self-determination in democracy. However, in cases where unavoidable value decisions touch on the limits of the free self-determination of individuals, collective self-determination of the people as grounds of legitimacy of a certain understanding of human dignity appears shaky.[1235]

> The Federal Constitutional Court must not succumb to the temptation [*nicht der Versuchung erliegen*] to take over for itself the function of a controlling organ and shall not in the long run endanger the authority to judicially review constitutionality.[1236]

The constitutional judge is portrayed in this excerpt as an evolving self. As the speaking self in the *Abortion I Case* – and any other case before it – the FCC carries the responsibility not to endanger in the long run the authority of the constitutional judge to review constitutionality. The human factor, that is, human beings

[1232] BVerfGE 39, 1 (69)
[1233] BVerfGE 39, 1 (69)
[1234] BVerfGE 39, 1 (70)
[1235] Starck (1981) 457, 462f. [On those grounds Starck questions the relevance of the social welfare state or the transsexual cases to the law of human dignity.]
[1236] BVerfGE 39, 1 (70)

representing the institution at a given momentum in its historical continuum, features prominently in the phrasing of this proposition, despite reference to a 'controlling organ'. The hermeneutic and literary approach to texts as aspects of judicial practice permits tracing the human factor in institutional frameworks from an angle different to doctrinal or sociological approaches. The anthropomorphism evident in the phrase 'must not succumb to the temptation' reaffirms the aptness of parallelizing the manifestation of the separation of powers in the text to a process of self-reflection and intimates how the practice of self-restraint rests on the stance adopted by human beings representing the institution at a particular time and context. The anthropomorphic depiction of this Court as an evolving self entrusted with safeguarding the authority of the constitutional judge to review constitutionality, namely to respond responsibly within the latitude prescribed in the Basic Law, reinforces the observation that the inferable responsibility is borne ultimately by the human beings judging the specific case.

The practice of fundamental legal norms 'departs from the basis of classical judicial control.'[1237] Fundamental legal norms at the center of the Basic Law 'guarantee as rights of defense to the citizen in relation to the state a sphere of unrestricted structuring of one's life based on personal responsibility.'[1238] The phenomenological portrayal of practicing fundamental legal norms as rights of defense furthers another perception of that sphere by analogy with the radical distance between citizens as the absolutely other and the state as self. The 'classical function'[1239] of the FCC as a manifestation of the state, 'lies in defending against injuries to this sphere of freedom from excessive infringement by state power.'[1240] The dissenters portrayed the Court's self-understanding re how it interferes with the other. The guarantee of this sphere of freedom conveys a commitment to protecting the absolute separation of citizens from the state.

The arbitrary freedom of the state to interfere with that sphere is tempered by justice, in this case justice embodied in fundamental rights. This is a particularity of judicial practice of fundamental legal norms: the constitutional judge, an expression of state power, is at the same time the defender of a sphere of freedom for the human being from the arbitrarily totalizing authority of the state. It should not, however,

[1237] BVerfGE 39, 1 (70)
[1238] BVerfGE 39, 1 (70)
[1239] BVerfGE 39, 1 (70)
[1240] BVerfGE 39, 1 (70)

escape our attention that both the identification of that sphere and the dynamics between the self and the other are doctrinally determined, hence framed as totality structures and subject to the vision of an eye looking through the lens of the Basic Law, that is, the dissenters as the speaking self. Does absolute separation survive this totality? By artificially destroying distances at the level of language and meaning within the text of the decision, the judge can break with the sterilized *status quo* of the tautological proposition of human dignity in order to fine-tune in actuality the guarantee of human dignity in law with reality, lived experience.

> On the scale of possible infringements by the state, penal provisions are positioned at the top: they demand of a citizen a definite behavior and subdue him in the case of a violation with sensitive restrictions of freedom or with financial burdens. Judicial control of the constitutionality of such provisions therefore means a determination whether the encroachment resulting either from the enactment or application of penal provisions into protected spheres of freedom is allowable; whether, therefore, the state, generally or to the extent provided, may punish.[1241]

The execution of penal measures interrupts the continuity of human being-ness. The intensity of the interruption caused by penal provisions is of the highest degree among possible infringements by the state. Whereas the question, as it appears in the above excerpt, should be whether the state may punish, in the constitutional dispute on abortion the majority raised 'for the first time'[1242] the questions 'whether the state *must* punish' and 'whether the abolition of punishment for the interruption of pregnancy in the first three months of pregnancy is compatible with fundamental rights.'[1243] The dissenters reacted to this inversion:

> It is obvious, however, that the disregard of punishment is the opposite of state encroachment [*Es liegt aber auf der Hand, daß das Absehen von Strafe das Gegenteil eines staatlichen Eingriffs ist.*]. Since the partial withdrawal of the penal provision did not occur to benefit interruptions of pregnancies but rather, because the previous penal sanction, according to the irrefutable assumption of the legislature which has been confirmed by experience, has thoroughly proved itself ineffective, an 'attack' on the unborn life by the state is not even indirectly construable.[1244]

[1241] BVerfGE 39, 1 (70)
[1242] BVerfGE 39, 1 (70)
[1243] BVerfGE 39, 1 (70)
[1244] BVerfGE 39, 1 (70f.)

The dissenters clarified that the motivation underlying the partial withdrawal of the penal provision by the legislature renders 'an 'attack' on the unborn life by the state […] not even indirectly construable.' The quotation marks bracketing the noun attack [*Eingriff*] are indicative of the dissenters' critical stance towards the communication of an understanding of the state's response to unborn life that cannot be even indirectly derived from the statutory reform. While it cannot be denied that the statutory measures would effectively facilitate undergoing abortion, it is plausible to understand those as a responsible response on the part of the state as self in view of the proven ineffectiveness of the previous penal sanction. Through the partial withdrawal of the penal provision the legislature sought to enhance the effectiveness of protection. Similarly to the argument of the Federal Minister of Justice, who noted that 'with the withdrawal of the penal sanction for an interruption of pregnancy in the first weeks of pregnancy the state does not bestow upon the mother a right to the operation' [majority opinion][1245], the dissenters distinguished between the purpose of the statutory reform and the unattended to and superficial criticism that it favored interruptions of pregnancy.

Essentially the dissenters zoomed in on the legislature as the self and engaged in portraying the reasons for the statutory reform or, in phenomenological terms, of the self's response to the other. To the extent that the consciousness of the self in practicing the law is assumed and the reasons leading the self to a certain response form an aspect of the signification and significance of that response, portraying the self as clearly as possible is of crucial importance. The dissenters argued, similarly to the Federal Minster of Justice, that the withdrawal of punishment could not be equated with a positive stance towards interruptions of pregnancy or even the granting of a right to undergo abortion; the ethical appreciation of each response requires special scrutiny and clarity as regards the reasons that guided the process of lawmaking. The phenomenological approach calls for emphasis on 'who is speaking and why' than 'merely […] what is said'[1246]. From a rhetorical perspective, elucidating the depiction of the self and the reasons why the self acts can be understood by analogy with the appeal to the character of the orator as a determinant of meaning in rhetoric.

[1245] BVerfGE 39, 1 (25)
[1246] Levinas, *Totality and Infinity,* 18 [Introduction by John Wild]

One mode of practicing responsibility towards the other in a dissenting opinion is scrutinizing the demonstrated ability of the self to respond in the majority opinion. The dissenters challenged the argument that 'the reception of Art. 2 sec. 2 GG unquestionably originated from the reaction to the inhumane ideology and practice of the National Socialist regime […]'[1247], thus unveiling a further instance of possible unfounded certainty and unsound argumentation in the majority opinion. They drew a distinction between 'the constitutional assessment of the killing of a child *en ventre sa mere* by the pregnant woman herself or by a third party with her consent' and 'such a killing by the state, as, for example, by the Nazi regime.'[1248] They added that the Nazi regime 'had taken up a rigorous standpoint corresponding to its biologically oriented ideology towards population […]'[1249], that is, precisely the standpoint that Levinas opposes to in the definition of fraternity in *Totality and Infinity*. The dissenters discouraged an association of the prohibition of these cases of interruption of pregnancy with the constitutional order's reaction to National Socialism, that is, to 'the mass destruction of human life by the state in concentration camps and, in the case of the mentally ill, sterilizations and forced abortions directed by authorities, to medical experiments against their will on human beings, to disrespect of individual life and human dignity which was expressed by countless other measures of state […]'[1250]. Therefore, drawing conclusions re the constitutional dispute on the interruption of pregnancy by the pregnant woman or a third party with her consent appeared 'less pertinent' [*ist um so weniger am Platze*][1251] than understanding such a killing by the state in light of the historical background of the Basic Law. The effort to clarify who is acting and in what context and, accordingly, to ascribe actions – also language games or speech acts – with the greatest possible

[1247] BVerfGE 39, 1 (76); The time-honored practice of the law of human dignity apropos the National Socialist historical background of Germany in FCC jurisprudence can be interpreted in light of Michael Walzer's insights into the Biblical prophets as 'hermeneutic social critics', in Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987), as presented in Guyora Binder & Robert Weisberg, *Literary Criticism of Law* (Princeton, New Jersey: Princeton University Press, 2000) 198f.: 'Walzer offers the Biblical prophets as examples of hermeneutic and social critics. Their message was neither universal nor esoteric but directed at all Israelites. They condemned the practices prevailing in their own societies, but not from the standpoint of universal justice. Instead they condemned their society for failing its own professed values.' Setting the National Socialist past as a point of reference can be understood as a condemnation for failing the values professed in the Basic Law as a reaction to the specific past and as a commitment to deliver upon the professed values in responsibility before God and human beings [Preamble to the Basic Law].
[1248] BVerfGE 39, 1 (76)
[1249] BVerfGE 39, 1 (76)
[1250] BVerfGE 39, 1 (76)
[1251] BVerfGE 39, 1 (76)

precision to those actually responsible appears to be one of the dissenters' primary concerns in the opinion.

The dissenters demonstrated openness to comparative insights. How does another self with similar authority to produce meaning treat this constitutional question? In support of the argument that partial withdrawal of punishment for the interruption of pregnancy is not tantamount to violation of the legal value of unborn life, the dissenters mentioned the position of the Austrian Constitutional Court, which denied that the regulation of terms constitutes a violation of fundamental rights recognized by Austrian law. In another part of the dissenting opinion, the possibility of delineating distinct stages of pregnancy and thereby justifying the differentiated penal treatment of interruptions of pregnancy based on the time they are performed was grounded on comparative insights from 'domestic and foreign legal systems'[1252] and the paradigmatic example of *Roe v. Wade* of the Supreme Court of the United States. The dissenters put forward the comparative relevance of the regulation of terms and counseling measures.

> That the decision of the German legislature for the regulation of terms and counseling neither arises from a fundamental attitude which is to be morally or legally condemned, nor proceeds from apparently false premises in the determination of the circumstances of life is confirmed by identical or similar *provisions for reform in numerous foreign states.* [1253]

The dissenters traced the process of self-reflection between the legislature and the majority of the Court as manifested in the constitutional dispute on abortion. From a first person point of view – observing in essence the different lines of argumentation from the outside – the dissenters contended that the majority of the Court, minding the unsuitability of fundamental rights as defense rights 'from the beginning' to prevent the elimination of penal provisions by the legislature, sought an appropriate justificatory basis 'in the more extensive meaning of fundamental rights as *objective value decisions.*' The dissenters explained, 'fundamental rights not only establish rights of defense of the individual against the state, but also contain at the same time objective value decisions, the realization of which through affirmative action [*durch aktives Handeln*] is a permanent task of state power.'

[1252] BVerfGE 39, 1 (71)
[1253] BVerfGE 39, 1 (94)

> As defense rights the fundamental rights have a comparatively clear recognizable content; in their interpretation and application, the jurisprudence have developed practicable, generally recognized criteria for the control of state encroachments for example, the principle of proportionality. On the other hand, it is regularly a most complex question, *how* a value decision is to be realized through affirmative measures of the legislature.[1254]

The dissenters furthermore referred to the doctrinal development of this distinction in FCC jurisprudence and applauded the effort of the FCC [*begrüßenswerten Bemühen*] to thereby doctrinally 'lend greater effectiveness to the fundamental rights in their capacity to secure freedom and to strive for social justice.' [A. I. 2.]. Emphasis on the effectiveness of fundamental rights practice evokes the mutual dependence between the humanism and the pragmatism of law. Effectiveness surfaces as the standard for assessing responsibility towards the other in the practice of fundamental rights.

The dissenting opinion demonstrated greater attentiveness to the clarity and accessibility of the meaning produced, that is, of what is said, and to the portrayal of the self, in that case the FCC. Clear articulation of – even time-honored – doctrinal definitions can be viewed as an act of generosity in light of a phenomenology that invests in language as the basis of conversation between the self and the other. The dissenters as the speaking self strived for intelligibility of meaning and for a more transparent portrayal of the majority as the self who produced meaning that has an impact at the level of enforcement. The dissenters concluded that the majority 'insufficiently considers differences in the two aspects of fundamental rights, differences essential to the judicial control of constitutionality.'[1255] Failure to sufficiently demonstrate the premises of legal arguments can undermine the practice of fundamental rights as a responsible answer to the other on the part of the self.

The task of the state is to protect the legal values guaranteed and recognized by the constitution. The Basic Law constitutes the lens through which state actors look in practicing the law. Whereas the state should not subject the ethics of society to the totality of its vision, it still practices those in propositions communicating the legal values of the constitutional order. The concept of legal values guaranteed and recognized in constitutional jurisprudence embodies the ethics of the constitutional

[1254] BVerfGE 39, 1 (71); Hoerster (1983) 93, 94-95 [Moral value judgments are unavoidable particularly in practicing the law of human dignity.]
[1255] BVerfGE 39, 1 (71)

order and society. Do, however, constitutional legal values enjoying state protection in fact correspond to the ethics of society? Responding to that question requires ongoing sociological inquiry into the ethics of society and, subsequently, hermeneutic and literary analysis of the language employed within the realm of society vis-à-vis the realm of law. A responsible answer, argued the dissenters, secures 'an effective development of developing life' while taking into account the interests of the pregnant woman 'which are deserving of protection'.[1256] To the extent that penal provisions are 'imperatively'[1257] required, hence proportional, the state can employ them to secure a responsible response to the other.

> On the whole therefore, in our opinion, the legislature was not prevented by the constitution from dispensing with a penal sanction, which, according to its irrefutable view, was largely, ineffective, inadequate, and even harmful. Its attempt to remedy through socially adequate means the manifestly developing inability of state and society in the present conditions to serve the protection of life may be imperfect; it corresponds, however, more to the spirit of the Basic Law than the demand for punishment and condemnation. [1258]

Practicing fundamental rights as 'necessarily generally held value decisions'[1259] presents considerable complexity. The value decisions involved 'can be characterized as constitutional mandates which, to be sure, are assigned to point the direction for all state dealings but are directed necessarily toward a transposition of binding regulations.'[1260] Decisions reflected in the value order of the Basic Law convey the ethical dimension of the meaning incarnated in fundamental rights. From a hermeneutic and literary perspective, noticing that decisions are the wellspring of the value order directly evokes the human factor, the metaphysical subject at the limit, where ethics and aesthetics lie, human beings within institutions. As another curve carved on the lens before the eye of state actors, the ethics of the Basic Law embodied in fundamental rights permeate 'all state dealings' and determine the direction to be taken in producing meaning. The direction is humanism yet as defined in its particulars and practiced by those entrusted with the transposition of binding regulations in light of the value order to cases springing from lived experience.

[1256] BVerfGE 39, 1 (94)
[1257] BVerfGE 39, 1 (94)
[1258] BVerfGE 39, 1 (95)
[1259] BVerfGE 39, 1 (71)
[1260] BVerfGE 39, 1 (71)

Conceivable solutions of the conflict are contingent on context, namely 'the determination of actual circumstances, […] the concrete setting of goals and their priority and […] the suitability of conceivable means and ways'[1261], value judgments and pragmatic considerations on the one hand, and the ambiguity and controversy ensuing from necessary compromises and the unavoidable course of 'trial and error'[1262] on the other. Minding the intense discord on the subject matter, the legitimacy of the decision on this constitutional dispute depends on the representation, to the highest possible degree, of the viewpoint of the self-determined people of the constitutional state, which democratically ensues from equally multifarious and conflicting viewpoints. The legislature is responsible for taking that decision, argued the dissenters, because it is 'directly legitimized by the people.'[1263] Through the legislature the people exercise – granted indirectly – self-determination within the totality structure of the constitutional order. The democratic constitutional order founded on human dignity institutes concepts and processes, crucially, critical reflection mechanisms and tools, that guarantee non-subsumption under a totality structure.

The dissenters affirmed that the 'growing significance of promoting social measures to effectuate fundamental rights'[1264] renders the judicial control of constitutionality to a certain extent necessary. To those ends the dissenters deemed 'the development of a suitable instrument which respects the freedom of the legislature to structure'[1265] one of the most compelling tasks of judicial decision-making in the future.

> As long as such an instrument is lacking, the danger exists that judicial control of constitutionality will not limit itself to reviewing decisions of the legislature but rather will substitute another decision which the Court determines to be better. This danger will exist in a heightened degree, when – as here – in sharply controversial questions a decision made by the parliamentary majority after long debate is challenged before the Federal Constitutional Court by the defeated minority. Without prejudice to the legitimate authority of those entitled to petition the Court to resolve constitutional doubt in this manner, the Federal Constitutional Court is unwarily falling in this case into the position

[1261] BVerfGE 39, 1 (71f.)
[1262] BVerfGE 39, 1 (72)
[1263] BVerfGE 39, 1 (72)
[1264] BVerfGE 39, 1 (72)
[1265] BVerfGE 39, 1 (72)

> of a political arbitration board to be used for the choice between competing legislative projects.[1266]

For the principle of separation of powers to function as a self-reflection mechanism, balance in the dynamics and the distance between the branches of state power should be maintained, so that each power, when acting as the speaking self, can critically reflect on whether absorbing the alterity of another understanding on a given subject matter, produced by another branch as a manifestation of the self, is compatible with the constitution. The judicial review of decisions of the legislature presupposes the distance of viewpoints between state actors representing respectively the judicial power and the legislative power. Substitution signifies the destruction of the distance essential for self-reflection.

Critical reflection is the process that guarantees law's humane practice. Depicting the separation of powers as a self-reflection mechanism of the state – a portrayal made possible by the hermeneutic and literary methodology employed for present purposes – far from projecting an anthropomorphic rendering of institutions, underlines how critical reflection constitutes an indispensible aspect of the meaning of practicing human dignity in law. The dissenters observed the heightened difficulty in the case of 'sharply controversial questions'[1267]. This affirms the empirical observation that triggered the present analysis, namely that 'something is missing', experienced as uncertainty re the right answer among various courses of action. The defeated parliamentary minority calls upon the FCC to play the role of 'a political arbitration board to be used for the choice between competing legislative projects.'[1268] The FCC is 'neither competent nor equipped'[1269] to answer, that is, has no responsibility to respond.

> The idea of objective value decisions should however not become a vehicle to shift specifically legislative functions in the formation of social order onto the Federal Constitutional Court. Otherwise the Court will be forced into a role for which it is neither competent nor equipped. Therefore, the Federal Constitutional Court should maintain the restraint […] [cited cases omitted]. This Court should confront the legislature only when the latter has completely disregarded a value decision or when the nature and manner of its realization is obviously faulty. On the other hand, in spite of supposed acknowledgement of legislative freedom to structure, the

[1266] BVerfGE 39, 1 (72)
[1267] BVerfGE 39, 1 (72)
[1268] BVerfGE 39, 1 (72)
[1269] BVerfGE 39, 1 (72)

> majority effectively charges the legislature with not realizing a recognized value decision in, according to the majority's view, the best manner possible. Should this become the general standard for judicial examination, the requirement of judicial self-restraint would accordingly be sacrificed.[1270]

The formation of social order by state powers should – to the extent possible in the context of a democratic state – originate in the self-determination of the people. The people practices self-determination primarily through the legislature. The egocentric experience of the self with authority over meaning cannot be renounced. Conversation, according to the phenomenology of Levinas, grants the other as Other a right over the egoism of the self. Dispensing with the totality of the self, especially in the practice of law, is neither an option, nor a desideratum. In a democratic constitutional order, totality structures ensuing from the formation of social order by the legislature are – significantly – self-imposed, in other words generated by the collective self, the people, who is granted, as a collective other, a right over the egoism of the self with competence and responsibility to respond, that is, of the state and particularly legislative power. What is more, conversation is vital to democratic procedures. In the controversial constitutional dispute on abortion, noticed the dissenters, the parliamentary majority concluded on the statutory reform after long debate. Democracy encourages and feeds on deliberation and politics of dissensus.

The scope of the Court's responsibility was further delineated: the FCC 'should confront the legislature only when the latter has completely disregarded a value decision'[1271], in other words has evidently not looked through this particular curve of the lens, 'or when the nature and manner of its realization is obviously faulty'[1272], namely in the case of an irresponsible response. Similarly to the *Subsistence Minimum Case*, the FCC took on the task of addressing the constitutionality of the legislature's disregard for or 'obviously' irresponsible response to the other. The assessment, however, of what amounts, from a phenomenological perspective, to non-response or an irresponsible response is ultimately a value judgment.

The dissenters criticized the majority of the Court for an inconsistency: 'in spite of supposed acknowledgment of legislative freedom to structure'[1273], the

[1270] BVerfGE 39, 1 (72f.)
[1271] BVerfGE 39, 1 (73)
[1272] BVerfGE 39, 1 (73)
[1273] BVerfGE 39, 1 (73)

majority claimed that the legislature did not realize a recognized value decision in the best manner possible. Whether this practice of judicial review abides by the requirement of judicial self-restraint as a reaction to an 'obviously' irresponsible response on the part of the legislature is a matter contingent on how a responsible answer is construed in a given case. Prior to the juxtaposition and evaluation of the multifarious understandings of what a responsible answer amounts to, it is imperative to portray those; this is the modest objective of the present analysis. The dissenters stated '[s]hould this become the general standard for judicial examination, the requirement of judicial self-restraint would accordingly be sacrificed.'[1274] In the reasoning that followed, this proposition was elaborated on.

> Our strongest reservation is directed to the fact that for the first time in opinions of the Constitutional Court an objective value decision should function as a *duty* of the legislature *to enact penal norms,* therefore to postulate the strongest conceivable encroachment into the sphere of freedom of the citizen. This inverts the function of fundamental rights into its contrary. If the objective value decision contained in a fundamental legal norm to protect a certain legal value should suffice to derive therefrom the duty to punish, the fundamental rights could underhandedly [*unter der Hand*], on the pretext of securing freedom [*aus einem Hort der Freiheitssicherung*], become the basis for an abundance of regimentations which restrict freedom.[1275]

The dissenters interpreted the mobilization of the objective value decision doctrine in the majority opinion as an inversion 'of the function of fundamental rights into its contrary.'[1276] They essentially challenged the compatibility of the meaning of objective value decisions embodied in the fundamental rights of the Basic Law with the duty of the legislature to respond to abortion by means of penal norms ostensibly derived therefrom. According to the dissenters, the appeal to the ethics of the Basic Law by the majority of the Court served as a justification for 'the strongest conceivable encroachment into the sphere of freedom of the citizen […]'[1277]. This

[1274] BVerfGE 39, 1 (73)
[1275] BVerfGE 39, 1 (73)
[1276] BVerfGE 39, 1 (73); ibid (74) ['[…] it is no longer necessary merely to determine alone whether a penal provision encroaches too far into the sphere of rights of the citizens, but also the inverse, whether the state punishes too *little.* Therefore the Federal Constitutional Court will, contrary to the majority opinion, not be able to restrict itself to the question whether the enactment of any particular penal norm regardless of its contents is required, but in addition must clarify which penal sanction suffices for the protection of the respective legal value. In the last consequence the Court may find it necessary to determine whether the application of a penal norm in the individual case satisfies the concept of protection.']
[1277] BVerfGE 39, 1 (73)

practice of fundamental rights as objective value decisions, argued the dissenters, is underhanded and merely a pretext for practicing the law in a manner that, in truth, contradicts, rather than advances, humanism. Punishment as the chosen means for forcing compliance with that order totalizes the human being in that it interrupts the continuity of human being-ness; human beings find themselves in positions where 'they no longer recognize themselves'[1278] and feel estranged from 'their own substance'[1279]. In resisting compliance with the doctrine of judicial self-restraint, the majority of the FCC acted as a totalizer. When, in exercising judicial review, the FCC exceeds the constitutionally determined latitude to produce meaning, and directs the legislature to employ penal measures against abortion, a totality is instituted from which there is no escape.

> If, however, judicial self-restraint has validity, the Constitutional Court *a fortiori* should not compel the legislature to employ the power of punishment, which is the strongest means of state coercion, to compensate for the social neglect of duty with the threat of punishment. This certainly does not correspond to the function of penal law in a liberal social state.[1280]

What the dissenters designated as the target of their 'most important objection' was the failure of the majority 'to explain how the requirement of condemnation as an independent duty is constitutionally derived.'[1281] In other words, the dissenters identified a leap in the internal justification of the legal argument that leads to the majority decision. The dissenters expressed their view that 'the constitution nowhere requires that ethically objectionable behavior or conduct deserving of punishment must *per se* be condemned with the help of the statutory law without regard to the desired effect.'[1282]

vii. Pluralism, the intersubjective space, and another face-to-face encounter (Dissenting opinion)

The gist of the dissenting opinion in the *Abortion I Case* from the perspective of this phenomenological analysis is found in the excerpt that follows.

[1278] Levinas, Totality and Infinity, 21
[1279] ibid
[1280] BVerfGE 39, 1 (86f.)
[1281] BVerfGE 39, 1 (93)
[1282] BVerfGE 39, 1 (93f.)

> In a pluralistic, ideologically neutral [*weltanschaulich neutralen*] and liberal democratic community [*Gemeinwesen*], it is a task for the forces of society to codify the postulates of ways of thinking [*Gesinnungspostulate*]. The state must practice abstention in this matter; its task is the protection of the legal values guaranteed and recognized by the constitution. For the constitutional decision it matters only whether the penal provision is imperatively required to secure an effective protection of developing life, having taken into consideration the interests of the woman which are deserving of protection.[1283]

Pluralism, according to Levinas, presupposes absolute otherness, thus non-subsumption under the neutral, the objective, or common knowledge. In *Totality and Infinity* neutrality is considered a totality trait. Here, however, the ideologically neutral[1284] could well be denoting the empty space, 'something missing', guaranteed within a pluralistic, liberal democratic community to enable intersubjectivity, that is, infinity[1285], 'something always missing'. Attention should be drawn to the German original, '*weltanschaulich neutralen'*; the word '*weltanschaulich*' communicates precisely portrayal set up in this study, namely the view on the world, on the lived experience of the world within our field of sight, the perspective on the other and the Other.

The practice of self-determination is premised on the liberal and democratic character of the community. The determination of ways of thinking, views, convictions, and, more generally, the ethics of the community is entrusted to 'the forces of society'. Codification totalizes; the construction of a totality comprising 'the postulates of ways of thinking' in the community is assigned to the forces of society. The legitimacy of this codification, and, more generally, of totality structures in a pluralistic, ideologically neutral, liberal and democratic society, is grounded on the exercise of self-determination by human beings as citizens of a democratic state and members of society. The state should abstain from totalizing the ethics postulated in society, in other words should demonstrate respect for the absolute otherness of society as a collective account of human being-ness.

The portrayal of the social phenomenon of abortion in the dissenting opinion is telling of deeper inquiry into the specifics of the relationship of the child *en ventre sa mere* and the pregnant woman and of higher attentiveness to the pregnant woman

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[1283] BVerfGE 39, 1 (94)
[1284] Köhne (2004) 285, 287
[1285] See Johannes Schwartländer, 'Freiheit im weltanschaulichen Pluralismus. Zum Problem der Menschenrechte' in Josef Simon (ed), *Freiheit* (Freiburg and München: Alber, 1977) 205, 205ff.

as the other.[1286] The dissenters noted how 'the immediately impressive statements about the undisputed high rank of the protection of life neglect the *uniqueness of the interruption of pregnancy* in relation to other dangers of human life.'[1287] The legal language game of the *Abortion I Case* comprises various conceivable relations that feature in the portrayal of the phenomenon of the interruption of pregnancy. It hence constitutes already fertile ground for phenomenological analysis. Correspondingly to the ontological, the phenomenological account of the practice of the law of human dignity in the *Abortion I Case* evidences the uniqueness of the meaning of abortion.

> In the European legal history, which has been influenced by the Church, a distinction has been constantly made between born and unborn life. Even the value decision of the constitution leaves room for such a differentiation in the choice of measures of protection precisely because the fundamental right of Art. 2 sec. 2 GG is not – as the majority formulates – 'comprehensively' guaranteed, but rather is subject to statutory restriction. Otherwise neither the ethical nor the eugenic or even the social indications could be established.[1288]

The dissenters refrained from developing an abstract theoretical account of how the state should react to protect against murderers and killers. Rather than subsuming the social phenomenon under the totality of a theory and framing the constitutional issue as an academic question, the dissenters turned to historical context, namely 'European legal history', the text of the Basic Law, and the doctrine of value decisions. The first source can serve as grounds for drawing a distinction between born and unborn life, which, if maintained, would be *per se* a crucial aspect of the meaning of human being-ness and, particularly, of unborn life as the other in the *Abortion I Case.* The two other sources, constitutional text and doctrine, point to the fact that the distinction is mirrored in law. The dissenters engaged in the portrayal of the state as the self. Critique, unlike theory, 'does not reduce the other to the

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[1286] Justice Rupp-von Brünneck, the sole woman among the 16 members of the FCC at the time, 'had no quarrel with the proposition that the state had an obligation to protect the fetus under the 'right to life' provision of the Basic Law.' However, 'in requiring counseling and providing public support to any woman who would carry her child to term, the state had struck a permissible balance between the fetus's right to life and the woman's right to the development of her personality.' In the review of 'the post-reunification abortion statute passed by the newly elected, all-German parliament' (Judgment of May 28, 1993, 80 BVerfGE 203, 1993), Justice Rupp-von Brünneck's reasoning prevailed in the decision of the Second Senate of the FCC. Donald P. Kommers, 'Wiltraut Rupp-von Brünneck', in Rebecca Mae Salokar, Mary L., *Women in Law – A Bio-Bibliographical Sourcebook* (Westport, Connecticut; London: Greenwood Press, 1996) 281

[1287] BVerfGE 39, 1 (78)

[1288] BVerfGE 39, 1 (78f.)

same'.[1289] From a phenomenological perspective, reference to the first source, European legal history, imparts a component of the self-understanding of the German state. That European legal history is relevant a source, implies the European identity of the German state. This feature of the self can be construed as a substantiation of sameness.

Although the majority of the Court did not challenge the validity of the distinction between prenatal and postnatal stages of development, noted the dissenters, it did not 'distinguish […] between the different aspects of fundamental legal norms.' In the case of the state encroachment of fundamental rights as defense rights 'a distinction cannot, of course, be made'[1290] between the two stages of development of life: 'the embryo is, insofar as it is a potential bearer of fundamental rights, to be protected without exception in the same way as each born human life.'[1291] Potentiality is the critical quality of this concretization of law's *Menschenbild*. The dissenters discerned, however, the difference between state encroachment and injuries to unborn life by a third party against the will of the pregnant woman and 'to the refusal of the woman to allow the child *en ventre sa mere* to become a human being.'[1292] In the latter instances, equal treatment under the law has, respectively, limited applicability and no applicability. From a viewpoint external[1293] to the relation between the self, namely the state, and the other, that is, the human beings involved, the dissenters explained how, first, fundamental legal norms as defense rights and as objective value decisions serve as distinct lenses through which the self looks in encountering the other, hence influence how the other is perceived and responded to; second, that the distinction between prenatal and postnatal stages of development is irrelevant to the portrayal of law's *Menschenbild* when fundamental rights as defense rights are involved, to wit law's *Menschenbild* remains in that respect empty; and, third, the relation between the involved human

[1289] Levinas, *Totality and Infinity*, 43
[1290] BVerfGE 39, 1 (79)
[1291] BVerfGE 39, 1 (79)
[1292] BVerfGE 39, 1 (79)
[1293] The viewpoint is external to that of the Court and the human beings involved, yet should not be rendered as an Archimedian point. Wittgenstein refers to the Archimedian point apropos the world, what lies within the limits of our language; the dissenters are metaphysical subjects and interpreters. See Dworkin, *Law's Empire* (1986) 61f. ['I do not deny what is obvious, that interpreters think within a tradition of interpretation from which they cannot wholly escape. The interpretive situation is not an Archimedian point, nor is that suggested in the idea that interpretation aims to make what is interpreted the best it can seem.']

beings – all signified as the other vis-à-vis the state as self – is contingent on who the self with authority over the meaning of unborn life is.

The understanding that originates in the encounter of the dissenters as the self with the pregnant woman as the other is significantly different from the depiction in the majority opinion. The dissenters saw in the person of the pregnant woman 'a unique unity of 'actor' and 'victim'' [1294]. The legal significance of this portrayal of the face of the pregnant woman can be appreciated in view of the fact that 'much more is demanded of the pregnant woman than mere omission – as opposed to the demands on the one addressed by penal provisions against homicide: she must not only tolerate the far-reaching changes in her health and well-being associated with carrying the child *en ventre sa mere* to term, but also submit to encroachments upon her way of life which result from pregnancy and birth, and especially accept the maternal responsibility for the further development of the child after birth.'[1295] The dissenters evidently desired the encounter with and a profound understanding of the pregnant woman as the other. The portrayal of pregnancy in the dissenting opinion centers on the experience of the pregnant woman.

Legal judgment occurs within legal language games, namely fields narrower than the field of life, or subtotals of language games, and presupposes totality structures. In the above excerpt, totality is evoked by the 'lines of demarcation', which, according to the dissenter, Justice Rupp-von Brünneck, are justified in view of the 'lengthy process of development' leading to the birth of 'an independently existing living being'[1296]. Before that moment, conversely, developing life is not independent from the pregnant woman; the two are organically inseparable. Biological continuity constitutes, along with potentiality, an aspect of the human being-ness of the child *en ventre sa mere*. Be that as it may, it is not the critical factor determining where lines of demarcation – suggested or 'at least'[1297] permitted – are to be drawn. Rather than revolving around the unborn as the other, the dissenter emphasized the viewpoint of the pregnant woman. The encounter with the pregnant woman as the other, welcoming her, as she understands herself and her world, are noticeably portrayed in the above excerpt. The delineation of stages in the pregnancy

[1294] BVerfGE 39, 1 (79)
[1295] BVerfGE 39, 1 (79f.)
[1296] BVerfGE 39, 1 (80)
[1297] BVerfGE 39, 1 (80)

is tailored to the 'change in the attitude of the pregnant woman' [1298] and the 'growing maternal relationship'[1299] which, indeed, correspond to 'the different embryonic stages of development'[1300].

The hermeneutic and literary methodological approach to the text permits juxtaposition of a line of argumentation grounded in 'the biological continuity of the entire development until birth' with emphasis on the 'change in the attitude of the pregnant woman' and of the 'growing maternal relationship'[1301]. In *Totality and Infinity* Levinas rejects the biological basis of humanity. The pursuit of a justificatory basis for discerning stages in the evolution of pregnancy in the dissenting opinion focusing on the portrayal of the pregnant woman indicates desire to encounter the face of the other. An understanding founded on biologically defined characteristics does not convey, demand or further relational perceptions of the human being-ness of the mother and the unborn child. Interest in the experience of the 'growing maternal relationship' by the pregnant woman – the only one of the two parties able to partake in real conversation, besides responsible by nature to protect the unborn[1302] – connotes openness to real conversation and desire for a face-to-face encounter with the other. Language, the basis for deriving meaning from a face-to-face encounter with the human being, rather than vision, the means for identifying biological features of human being-ness and thereby forming an understanding of pregnancy, drives the dissenter in construing and depicting the unique relation of the child *en ventre sa mere* to the mother.

Revisiting the question of legal consciousness, the dissenter claimed that '[a]ccordingly' to the possibility of drawing demarcating lines between stages of pregnancy supported *supra* 'there is a difference between an interruption of pregnancy which takes place in the first stage of pregnancy and one which takes place in a later phase'[1303]. This difference is perceptible both in the legal consciousness of the pregnant woman and general legal consciousness. Listening and learning from experience liberates judgment from the totalizing effect of unattended to analogies.

[1298] BVerfGE 39, 1 (80)
[1299] BVerfGE 39, 1 (80)
[1300] BVerfGE 39, 1 (80)
[1301] BVerfGE 39, 1 (80)
[1302] The pregnant woman and the unborn child are not treated as two separated entities in the dissenting opinion. Despite being independently addressed, they are viewed as two substantiations of human being-ness composing the unique phenomenon of the 'growing maternal relationship'.
[1303] BVerfGE 39, 1 (80f.)

The dissenters approached the interruption of pregnancy as a particular threat to human life and reacted to the association of abortion with homicide.

> […] the legislature can and must proceed […] from the idea that the object of protection – the child *en ventre sa mere* – is most effectively protected by the mother herself and that her willingness to carry the child *en ventre sa mere* to term can be strengthened through measures of the most varied kinds.[1304]

The self with authority over the meaning – signification and significance – of unborn life as a concretization of human being-ness is the pregnant woman. The child is 'most effectively protected by her'; this statement at once intimates respect for the absolute separation of the other. In view of the natural maternal responsibility of the pregnant woman, the legislature not only 'must', but also 'can' only proceed from an understanding of the other as absolutely other. The response is premised on the acknowledgment of the effectiveness of entrusting the protection of unborn life to the mother practicing her natural responsibility. In that respect, the dissenters demonstrated readiness to listen and learn[1305] from the world of lived experience.

The willingness of the mother to carry the child *en ventre sa mere* to term is indicative of the meaning she endows developing life with. The speaking self demonstrated awareness of and respect for the viewpoint of the pregnant woman; the willingness of the pregnant woman is the determinant of the meaning produced. The ability of the state as self to respond can go so far as to strengthen her willingness to bear the unborn child to term 'through measures of the most varied kinds'. Whether responsibility is practiced in responding to the other depends on the choice of measures.

> Since no penal provision is required by nature to produce and secure the maternally protective relationship, the question arises whether a disturbance of this relationship, as is evident in the case of interruptions of pregnancy, can be obviated directly through a penal sanction in an appropriate manner.[1306]

The *ad hoc* phenomenological portrayal of interruptions of pregnancy testifies to the uniqueness of the dynamics between the state and the human beings involved, as well as between the mother or a third party and the unborn. A phenomenological reading of the *Abortion I Case* portrays a relational understanding of the other, the

[1304] BVerfGE 39, 1 (80)
[1305] Levinas, *Totality and Infinity,* 16 [Introduction by John Wild]
[1306] BVerfGE 39, 1 (80)

mother or a third party interfering with developing life in the context of abortion, vis-à-vis the unborn as another manifestation of the other. The dissenters noted that the legislature may react differently to the decision of the pregnant woman to undergo abortion 'than to the killing of human life by a third party.'[1307] The grounds in defense of clarifications of differences between abortion and other actions destructive of life are traced, argued Justice Rupp-von Brünneck, not only within the realm of nature, namely 'the natural sensitivities of the woman'[1308], but also within the realm of law. The dissenter pinpointed the 'mistaken, if not irrelevant', hence irresponsible, drawing of analogies between the term solution and euthanasia or 'the killing of unworthy life'[1309]. The family resemblances between the two legal language games cannot sufficiently ground their relevance; this remark stresses how linguistic-analytical and phenomenological portrayals are enterprises aiming at laying out the material that later needs to be critically assessed. Were they understood as the final word or, oversimplifiedly, as evidence of analogies and similarities requiring no further critical reflection, they would result in the production of poor, namely uninformed or irrelevant, legal argumentation.

> According to the *view of the undersigned Madame Justice,* the refusal of the pregnant woman to permit the child *en ventre sa mere* to become a human being is something essentially different from the killing of independently existing life, not only according to the natural sensitivities of the woman but also legally. For this reason the equating in principle of abortion in the first stage of pregnancy with murder or intentional killing is not allowable principally. Firstly, it is mistaken, if not irrelevant, to relate the term solution to euthanasia or even the 'killing of unworthy life' in order to distinguish it therefrom, as has occurred in the public discussion.[1310]

The employment of empirical insights in the dissenting opinion diverges significantly, hermeneutically and literary, from their use by the majority of the Court. In deciding how to best reform statutory law on the interruption of pregnancy, that is, how to responsibly respond to the other, 'it was especially significant for the legislature […] that the decision for an abortion grows out of a conflict situation based on varied motivations which are strongly imprinted with the circumstances of

[1307] BVerfGE 39, 1 (80)
[1308] BVerfGE 39, 1 (80)
[1309] BVerfGE 39, 1 (80)
[1310] BVerfGE 39, 1 (80)

the individual case.'[1311] Far from simply drawing attention to the implications of individual circumstances for the portrayal of the – constitutional – conflict, the dissenters offered examples of economic-material and personal reasons. Each example communicates an understanding ensuing from the face-to-face encounter with the other.

> In addition to economic or material reasons – for example, inadequate living conditions, insufficient or uncertain income for a perhaps already large family, the necessity for both spouses to be employed – stand personal reasons: the social discrimination against unwed mothers, which continues to exist, the pressure of the father or the family, fear of endangering the relationship with the partner or of strife with parents, the desire or the necessity of continuing education already begun, or of continuing to practice a profession, difficulties in marriage, the feeling of not being physically or emotionally equal to the care and control of more children, and with singles, also the unwillingness to educate the child at home in an irresponsible way.[1312]

Examples illustrate the uniqueness of individual circumstances and lived experience. From a hermeneutic and literary perspective, the value of examples is that they conjure up images and, thereby, portray, enhance and convey an understanding of the other, namely the pregnant woman, and a desire to portray in text her lived experience as perceived from her own viewpoint – to the extent that the latter can be soundly assumed. Examples stimulate a poetic experience of the humanism of the face-to-face encounter. In the face of the other we see the Other, in other words sense our separation from God. In phenomenological terms, awareness of the limited authority of the self over meaning denotes respect for the other's absolute separation from the self. In linguistic-analytical terms, limited authority over meaning ensues from the realization that metaphysical subjects are the limit and equal in that the world is to them their world.

Unlike the majority of the Court, the dissenters spelled out specific reasons why a pregnant woman would consider undergoing abortion. This elaborate demonstration suggests an effort to encounter the other in responsibility. The competence to respond is attained through surveyance of possible reasons leading to an interruption the pregnancy, and the examples offered in the above excerpt indicate a scanning of what lies within the field of sight that, ultimately, justifies the speaking

[1311] BVerfGE 39, 1 (83)
[1312] BVerfGE 39, 1 (83f.)

self's authority over the production of meaning. Previously in the dissenting opinion it was argued, 'the legislature can and must proceed […] from the idea that the object of protection – the child *en ventre* sa *mere* – is most effectively protected by the mother herself […].'[1313] The last example of personal reasons of the pregnant woman, 'the unwillingness to educate the child at home in an irresponsible way', approached through a hermeneutic and literary lens, affirms the consistency of the dissenters' stance towards the mother as an absolutely other bearing the responsibility to protect the child. The good faith of the dissenters as regards the virtuous motivation underlying the interruption of pregnancy in that case, namely the unwillingness of the woman to respond to the future educational needs of the child irresponsibly, is a far cry from the didactic stance of the majority of the Court in assuming a weak or forgotten maternal responsibility.

Individuals are organic constituents of society. The social dimension of law's *Menschenbild* is widely affirmed in FCC jurisprudence and features centrally in all the instances of practice of the law of human dignity presently under scrutiny. Nowhere, however, in the texts discussed, do we find an approach as sophisticated and profound as the succeeding analysis in the dissenting opinion of the *Abortion I Case*.

> The anxiety of the pregnant woman that the unwanted pregnancy would lead to a rupture in her personal life-style or in the standard of living of the family, the perception that in bearing the child *en ventre sa mere* she could not count on effective help from the world about her, but must meet alone the adverse consequences of behavior for which she alone is not accountable, often make interruption of pregnancy appear to be the only way out for her. Even when in the personal situation the imprudent motivations of comfort, of egotism, and especially of consumer aspiration are in the foreground, the burden cannot rest exclusively with the woman, but reflects at the same time the widespread materialistic and child-hating attitude of the 'affluent society.' Also neither the state nor society have developed up to this time sufficient institutions and life-styles which would enable the woman to combine motherhood and family life with personal development of equal opportunity, particularly in the professional area.[1314]

The dissenters introduce the notion of shared accountability between the individual and the collectivity. Who the other is, is to a considerable extent socially constructed. Even 'imprudent motivations' of an egotistic self are cultivated within

[1313] BVerfGE 39, 1 (80)
[1314] BVerfGE 39, 1 (84)

the ‘affluent society’. In the portrayal of society ensuing from the above excerpt enjoyment is associated with consumer aspiration, materialism and child-hating attitude. These are the traits of the community to which individuals belong, noted the dissenters. Both the state and society are accountable to give a responsible answer by developing ‘sufficient institutions and life-styles’ which would radically alter the terms determining how the pregnant woman exercises her authority over the meaning of the child *en ventre sa mere*, and would allow her to conquer the obstacles to the possibility of assuming responsibility for the unborn child. The dissenters in essence called for a pledge of self-reflection on the part of the state and society. In demanding the pregnant woman respond responsibly to the unborn child, the state in all of its manifested forms should take into account the shared accountability pointed out by the dissenters. The implication of the social dimension of law’s *Menschenbild* as depicted in the above excerpt is that individual and collective concretizations of human being-ness are communicating vessels.

4. Concluding observations

The ontological portrayal of the practice of the law of human dignity in the Abortion I Case demonstrates the inconsistency between the realm of life and the realm of law as regards the perception of the relation of the mother to the unborn child and pregnancy as a concretization of the human image. The majority of the FCC treated the two – inseparable in life – human beings as ontologically distinct interests. The human image of the unborn is contoured in light of potentiality and continuity associated with the traversal of limits in coming-into-being, that is, in evolving into a self-determined human being. The analysis shows how humanism and pragmatism are interlaced in the (humane) practice of the law of human dignity, and how the former might convert into paternalism when a single understanding of the ontology of the relation of the mother to the child en ventre sa mere is authoritatively established. Static portrayals of the human image within the realm of law amount to a forced human image, thus to an impairment of the self-determined unfolding of human being-ness guaranteed by the law of human dignity as understood in ontological terms. The dissenting opinion as such signifies the institutional provision for dissensus and critical reflection in practicing the law.

In putting together the linguistic-analytical portrayal of the Abortion I Case, I read the text to identify how the law operates as a lens before the judge by analogy

with the eye or the metaphysical subject, as well as other lenses influencing the eye's perspective on the world. Linguistic-analytical insights allow for a demonstration of how 'something always missing' as an aspect of human dignity meaning and concepts such as the *Wertordnung* is practiced though ineffable. A parallel can be drawn between the principle of proportionality and the logical form, and the function of human dignity as the highest value of the constitutional order vis-à-vis other fundamental rights and equation in the thought of Wittgenstein. Depicting the practice of the law of human dignity as a legal language game renders its intersection with the field of sight extending before the eye in the Wittgensteinian graph graspable. The dissenting opinion can be understood as a self-reflective look, a legal language game that emanates from another eye and comprises the majority opinion, that is, the object of critical reflection. The dissenters refigured the viewpoints traced within the majority opinion's legal language game and attended to the multifariousness of pregnancy as a concretization of human being-ness and a social phenomenon, offering examples that effectively enriched and broadened the boundaries of the legal language game.

The phenomenological account afforded the language for a portrayal of the self and the other in the practice of the law of human dignity. Who corresponds to the self and the other in the majority opinion significantly differs from such identifications in the dissenting opinion. The face-to-face encounter and the theme of the evolving self, inviolability and morality, absolute otherness and the interplay between totality and infinity surface in the text of the Abortion I Case as read through the introduced phenomenological lens. The majority and the dissenters perceived of what amounts to a responsible answer to the other on the part of the self differently; the very possibility of such divergence intimates that institutional provision is made for the pluralism of the intersubjective space. What is more, it hints at the need for guaranteeing that such spaces are created in producing human dignity meaning in a manner that is humane, that is, remaining true to the process of critical reflection to foreclose unbreachable obstacles to human beings' escape towards the infinite movement of coming-into-being.

II. The *Life Imprisonment Case* (1977)[1315]

The *Life Imprisonment Case* presents an opportunity to explore, from an ontological, linguistic-analytical and phenomenological perspective, the nexus between human dignity and freedom, the face-to-face encounter between the judge as self and the human being sentenced to life imprisonment, and the human image of the criminal among other themes raised in Chapter One. Although reference to a subsistence minimum in line with human dignity and to objectification as a violation of the law of human dignity is made in the *Life Imprisonment Case* legal language game, those themes are elaborated on more extensively in the analysis of the *Subsistence Minimum Case* and the *Aviation Security Act Case* respectively.

1. Decision

Persons deprived of liberty, and, therefore, of free exercise of any other right, are left with only dignity. The *Life Imprisonment Case* is seminal an instance in FCC human dignity jurisprudence, and, minding it was decided as early as 1977, a time-honored and still manifested point of reference in legal scholarship. The case recites the commitment of the German constitutional order to respect for and protection of human dignity as the *ultimum refugium* of human beings within the realm of law.

The law of human dignity guarantees a chance 'in principle' for those sentenced to life imprisonment to partake again in freedom at some point in the future. Pardon alone does not suffice to guarantee respect for the human dignity of the prisoner because it does not 'in principle' provide the aforementioned chance; statutory regulation is required.[1316] The legal guarantee of human dignity, while sufficient a justificatory basis for granting parole and leaving thereby open a realizable chance to regain freedom[1317], cannot go so far as to generally foreclose the enforcement of life imprisonment sentencing in the literal sense of the term.[1318] The rule of law prescribes the conditions and procedures for suspending the execution of life imprisonment sentencing.[1319]

[1315] BVerfGE 45, 187 (1977), First Senate of the FCC
[1316] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 49 ['gesetzlich geregelt werden']; Kunig, Art. 1, *GG Kommentar* (2012) para 36
[1317] Starck ibid
[1318] See also BVerfGE 72, 105 (116) (1986) [*Lebenslange Freiheitsstrafe*]
[1319] Kunig (n 1316) para 36; See Schmidhäuser *JZ* (1978) 265 [Opposed to general non-enforcement of life imprisonment in the literal sense of the term.]; See also Starck (n 1316) para 49 [Opposed to general non-enforcement of life imprisonment in the literal sense of the term.]

Guaranteeing a subsistence minimum in line with human dignity [*'menschenwürdiges Dasein'*] to the prisoners constitutes another aspect of the meaning of practicing the law of human dignity in the context of life imprisonment sentencing, discussed extensively in the analysis of the *Subsistence Minimum Case* (*infra*). Across legal orders, the poetic and rhetorical forcefulness of portrayals of human being-ness reaches its pinnacle in the context of death penalty and life imprisonment on account of the defensive subjective right and the objective duty of the state to protect human dignity[1320].

The 1977 *Life Imprisonment Case* is just one instance in a line of cases occupied with detention and framed as human dignity questions. Previously[1321] the FCC had proclaimed that constitutional principles are to determine the treatment of prisoners, and had expressly deferred to the parliament for the imposition of limitations on the rights of prisoners. One year later, in the *Lebach Case*[1322] the Court judged the compatibility of broadcasting a documentary comprising sensitive information re the person of the prisoner on German television with the Basic Law, and found an infringement of the fundamental right under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG on the basis of an individual-oriented and negative determination of the prisoner's fundamental rights and a positive and communitarian dimension of constitutional guarantees, such as the guarantee of rehabilitation and reintegration of the prisoner into society.

Life imprisonment sentencing is provided for under § 211 StGB[1323] and § 212 StGB[1324] in the sixteenth Section[1325] of the Criminal Code. The mandatory penalty of life imprisonment is the punishment accorded to extremely egregious circumstances of murder, particularly murder 'out of wanton cruelty or to cover up some other criminal activity'[1326]. Besides raising Art. 1 sec. 1 GG concerns, the District Court

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[1320] See also BVerfGE 30, 1 (1970) [*Wiretapping Case*, *Abhörurteil*]; BVerfGE 39, 1 (1975) [*Abortion I Case*]; BVerfGE 88, 203 (1973) [*Abortion II Case*]
[1321] BVerfGE 33, 1 (1972) [*Prisoners, Strafgefangene*]
[1322] BVerfGE 35, 202 (1973) [*Lebach*]
[1323] On *Mord* (murder) ['(1) Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft.']
[1324] On *Totschlag* (manslaughter) ['(1) Wer einen Mensch tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe noch unter fünf Jahren bestraft. (2) In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen.']
[1325] 'Straftaten gegen das Leben'. See Klaus Miebach & Günther M. Sander, *Münchener Kommentar zum Strafgesetzbuch* (Bd. 3, §§ 185-262, Munich: Verlag C.H. Beck, 2003)
[1326] § 211(2) StGB ['Mörder ist, wer aus Mordlust, zur Befriedigung des Geschlechtstriebs, aus Habgier oder sonst aus niedrigen Beweggründen, heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Mensch tötet.']

challenged the constitutionality of § 211 StGB and § 212 StGB in view of Art. 2 sec. 2 sent. 2 GG in conjunction with Art. 19 sec. 2 GG and Art. 3 sec. 1 GG. The succeeding presentation of core points in the holding of the FCC emphasizes human dignity considerations in the decision and in scholarly discussion.

The defendant, a drug dealer, was blackmailed by a drug addict, who threatened to bring into the open the defendant's illegal activity did he not deliver a drug he had ordered and apparently paid for. The defendant visited his customer at an appointed time in the latter's house, and shot him three times at close range in the back of the head while the drug addict was injecting the drug. The District Court asserted the incompatibility of the penalty of life imprisonment with Art. 1 sec. 1 GG, specifically the duty of the legislature to respect the human dignity even of a criminal, and brought forth the particulars of the deadlock situation experienced by human beings realizing that the possibility of return to society is foreclosed: '[…] prolonged incarceration is so debilitating, spiritually and physically, that life imprisonment can be expected to destroy a human being within about twenty years.'[1327] The District Court argued that ruling out the possibility of reentering society amounts to objectification of a human being, and referred the case to the FCC.

In the *Life Imprisonment Case* the FCC did not denounce the constitutionality of life imprisonment for murder in and of itself; rather, it set standards for how life imprisonment sentencing should be performed and how decisions charging life imprisonment should be reasoned. The constitutionality of life imprisonment rests on the humane execution of the sentence, which translates into instituting a concrete and principally attainable possibility to regain freedom at a later point in time, while preserving the hope of the criminal for a life of freedom, a notion central to the core of the legal concept. In that regard, the FCC found the incumbent legal rules of parole insufficient and even thoroughly discussed a reform proposal brought forth by the Ministry of Justice. Empirical data as regards the time frame of parole releases reinforced the Court's line of argumentation. Ultimately, the Court, exercising restraint, deferred to the legislator for decisions regarding parole regulations, expressing however concern for the burden falling on the holder of fundamental rights due to uncertainty in the evaluation of the factual background.

[1327] Norman Dorsen, Rosenfeld, Sajó & Baer, *Comparative Constitutionalism: Cases and Materials* (2nd edn, St. Paul, MN: Thomson/West, 2010) 585

Fundamental rights are protected even against the legislator. In the constitutional review of fundamental rights cases, the legislator's understanding is not binding. Human dignity, the rule of law, and the principle of the social state demand the consideration of particulars, 'the particular situation of each prisoner in terms of his or her capacity for rehabilitation and resocialization […]'[1328]. The Court reviewed relevant judicial practice, considered the results of scientific studies, decided that the District Court's referral was valid and ruled out a violation of Art. 1 sec. 1 GG if those condemned with the sentence of life imprisonment retain in principle a chance to partake in freedom.

Human dignity is a constitutional principle and, along with human personality, the highest legal value of the German constitutional order. Art. 1 sec. 1 GG enjoys unlimited validity in all areas of law, criminal law having undoubtedly the highest demands as to the maintenance of justice. In the *Life Imprisonment Case* the human being is defined as a spiritual-moral being that exercises self-determination, yet subject 'in principle' to limitations on his or her freedom to act posed by living in community with others. The precise limitations to be imposed lie with the legislator; be that as it may, two parameters, the constitutional guarantees of equality and human dignity, should be considered unfailingly in deciding on the deprivation of liberty. These constitutional guarantees notably intimate the meta-dimension of the legal concept of human dignity.

In the area of criminal law the constitutional concept of human dignity determines how the nature of penal sanctions, the relation between guilt and atonement, and between the severity of the offence and the guilt of the offender should be understood. The Court took notice of the progress of criminal law from more raw towards more humane and from more simple towards more differentiated forms of punishment. No claim to timeless validity of compliance of life imprisonment with Art. 1 sec. 1 GG can be made, argued the Court. Rather, the adoption of more humane forms of punishment in the future remains an open-ended possibility. Penalties should reflect justice, rather than simply the effort to combat crime so as not to lead to the objectification of the offender by the state. Constitutional limitations on the sentence of life imprisonment, in line with the state's commitment to social justice and with an understanding of human beings as both

[1328] See Kommers (1997) 311

individuals and community members, are called for to guarantee prisoners' subsistence minimum.

Not long after the *Life Imprisonment Case,* parliament revised the Criminal Code in the spirit of the decision, providing the possibility of reevaluation after fifteen years of served punishment in view of an *ad hoc* assessment of the gravity of the offender's guilt[1329]. In 1986[1330] the Court discussed the gravity of the crime as a criterion for deciding on the constitutionality of life imprisonment. In that case, the offender was a member of the SS, who was sentenced to life imprisonment for the murder of fifty persons in concentration camps. Twenty years later, at which point the prisoner had reached the age of eighty-eight years, the Frankfurt Superior Court blocked the prisoner's release on grounds of the gravity of the offender's crime. While sustaining the Superior Court's judgment and the balancing of competing interests that led that court to the respective decision, the FCC emphasized once more the importance of particulars. By granting priority to the personality, mental situation and age of the offender over the gravity of the crime, the Court sharpened and deepened the meaning of the requirement to perform judicial weightings in light of particulars in the context of life imprisonment sentencing.

2. Discussion

The state is under a duty to protect human life, the vital basis of human dignity, also against attacks of third parties. For that it utilizes, among other measures, the repressively effective means of criminal law.[1331] The *Objektformel* doctrine arises in the text of the *Life Imprisonment Case.* The doctrine famously originates in the thought of Kant[1332] and prohibits treating human beings merely as objects of state action. The *Life Imprisonment Case* reflects the commitment of the constitutional order to serve as a basis for the ideologically foundational positions of a pluralistic

[1329] See § 57 StGB ['Aussetzung des Strafrestes bei zeitiger Freiheitsstrafe'] and § 57a StGB ['Aussetzung des Straafrestes bei lebenslanger Freiheitsstrafe']; See also Bernd von Heintschel-Heinegg, *Münchener Kommentar zum Strafgesetzbuch* (Bd. 2, §§ 38-79b StGB, Munich: Verlag C. H. Beck, 2012) 645

[1330] BVerfGE 72, 105 (1986) [*Lebenslange Freiheitstrafe*; war criminal sentenced to life imprisonment]; See also BVerfGE 64, 261 (1983) [*Hafturlaub*; The Second Senate of the FCC found the denial of a ten-day release of the offender by the Frankfurt Superior Court incompatible with fundamental rights in the Basic Law, underlining specifically that the right to human dignity may not be denied to the offender.]

[1331] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 92

[1332] See ibid para 17

society in view of Art. 1 sec. 1 GG and the Basic Law as a whole.[1333] The other side of this commitment can be framed as resistance to the univocal and static understanding of the world[1334]. In the case under scrutiny the openness to change of viewpoints to the world and the perception of society and of the Court as an *ipse* rather than *idem* are plain to see.

Human dignity prohibits inhuman, humiliating and degrading[1335], treatment. Art. 1 sec. 1 GG protects the individual human being from a range of state infringements on human dignity such as torture, slavery, servitude, human trafficking, deportations, stigmatizations, and expulsions[1336]. In the execution of imprisonment sentencing 'the fundamental requirements of the individual existence of human beings should be safeguarded.'[1337] As argued in the *Life Imprisonment Case*, the imposition of a sentence to life imprisonment abides by the guarantee of human dignity insofar as it preserves a chance to regain freedom. [1338]

Whether a mentally ill or asocial person, or a criminal who is insusceptible to rehabilitation, regardless of personal liability or non-modifiable factors underlying the perception of the *Menschenbild*, human dignity always inheres in the human being.[1339] Actions that express disrespect for human dignity cannot bring about the waiving of the protection guaranteed in Art. 1 sec. 1.[1340] Human dignity cannot be lost.[1341] The protection guaranteed under Art. 1 sec. 1 GG is effective even in the cases of conduct that violates human dignity; the individual cannot renounce [*verzichten*][1342] the fundamental right of human dignity.[1343] In line with the law of

[1333] Kunig, Art. 1, *GG Kommentar* (2012) para 20; Cf. Stern (1983) *FS Scupin* 627, 631f.
[1334] Kunig ibid para 21; See also BVerfGE 96, 375 (400) [*Kind als Schaden*]
[1335] On the concept of humiliation see Margalit, *The Decent Society* (1996) 103f.
[1336] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 90; Kloepfer (2001) 77, 86
[1337] BVerfGE 45, 187 (228); BVerfGE 98, 169 (200) [*Arbeitspflict*; compulsory labor]
[1338] See Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 98
[1339] Ernst-Joachim Lampe (ed), *Beiträge zur Rechtsanthropologie* (Archiv für Rechts- und Sozialphilosophie, Beiheft 22, Wiesbaden, Stuttgart: Franz Steiner, 1985) 23, 29
[1340] Kunig (n 1333) para 12; State paternalism is the contrasting aspect of that matter, see for instance the *Peepschow Case,* Federal Administrative Court, BVerfGE 64, 274 (1981); v. Olshausen (1982) 2221
[1341] Spaemann, 'Über den Begriff der Menschenwürde', *Menschenrechte und Menschenwürde* (1987) 295, 304 ['unverlierbar']; Hasso Hofmann, 'Die versprochene Menschenwürde' in Hasso Hofmann, *Verfassungsrechtliche* Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 126 fn 119 ['juristiche Sprachlosigkeit'].
[1342] BVerfGE 45, 187 (229)
[1343] Kunig (n 1333) para 12

human dignity and the principle of the social state, the resocialization of the prisoner constitutes an essential aspect of the execution of a sentence to imprisonment[1344].

If the detainee poses an ongoing threat for other human beings, preventive custody [*Sicherungsverwahrung*] of lengthy duration does not infringe on human dignity.[1345] In that case, even substantial personality deformation and physical and mental damages to the detainee are accepted insofar as they cannot be averted by further refinement of the terms of detention.[1346] Still, a realistic chance for the prisoner to regain freedom must be provided. [1347] In the case of grave human dignity violations, as those accorded life imprisonment sentencing in criminal law, culpability as a determinant of meaning constitutes an objective aspect of the action or the omission of action. The clarification of how the inferred subjectivity and the objective framing of the intention are reconciled in practice is of significance from a hermeneutic and literary perspective. In the case of particularly grave crimes, the ascertainment of existing 'good intention' cannot remedy the finding of a human dignity violation. No requirement of demonstrating a subjective aspect of the meaning of the human dignity violation features in the *Life Imprisonment Case*. Conversely, subjective contemptuous intention does not suffice as grounds for identifying a violation, if the intervention does not objectively meet the degree of gravity of a human dignity violation.[1348]

The conclusive aim[1349] of certain conduct [*Finalist des Handelns*] can play a decisive role in the identification of violations of human dignity.[1350] The protective scope of the law of human dignity can be deduced from an overall evaluation [*Gesamtbetrachtung*] of the conclusive aim that precipitated an action as well the

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[1344] BVerfGE 35, 202 (235 f.) [*Lebach Case*]; BVerfGE 98, 169 (200) [*Arbeitspflicht;* compulsory labor]; See Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 118; Klaus Lüderssen, 'Resozialisierung und Menschenwürde', Prittwitz & Manoledaki (eds), *Strafrecht und Menschenwürde* (1998) 101

[1345] BVerfGE 109, 133 (151) [*Langfristige Sicherheitsverwahrung;* long-term preventive custody]

[1346] BVerfGE 109, 133 (150 f.)

[1347] BVerfGE 109, 133 (151); See Herdegen (n 1344) para 98

[1348] Kunig, Art. 1, *GG Kommentar* (2012) para 24

[1349] 'The subjective ground of desire is the incentive, the objective ground of volition is the motive; hence the distinction between subjective ends, which rest on incentives, and objective ones, which depend on motives that are valid for every rational being.' In Immanuel Kant, *Groundwork for the Metaphysics of Morals* (1785; Allen W. Wood ed and tr, *Rethinking the Western Tradition*; New Haven and London: Yale University Press, 2002) 45

[1350] See Herdegen (n 1344) para 49; Cf. Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 90 [in the context of biotechnology and biomedicine]; Matthias Herdegen, 'Die Menschenwürde im Fluß des bioethischen Diskurses' (2001) *JZ* 773, 775

mode of its occurrence.[1351] In certain extreme cases, such as discrimination on the grounds of race, the underlying purpose is as such the foundation of the violation regardless of the gravity of effects.[1352] The consideration of the ends-means-relation in the finding of a violation requires space beyond the figuratively firmly circumscribed conceptual core of human dignity [*Begriffskern*], a periphery [*Begriffshof*][1353] where the balancing of the gravity of the offense and the essential circumstances of pursued ends can take place.[1354] This space signifies a zone within which violations tangent to the protective scope of human dignity are, exceptionally, not judged to be infringements on the law of human dignity in light of a balanced overall assessment of all circumstances.[1355] This rudimentary balancing is an immanent aspect of human dignity meaning.[1356]

The central issue discussed in the *Life Imprisonment Case* is whether the sentence of life imprisonment as the legal order's response to the gravest of crimes is constitutional. Framing the imposition and execution of death penalty as an Art. 1 sec. 1 GG consideration[1357] appears – so argue certain voices in the German legal literature[1358] – redundant, despite relevance to the guarantee of human dignity, in view of the prohibition of death penalty under Art. 102 GG. Other approaches interpret the abolition of death penalty in the Basic Law to be ensuing directly from the legal guarantee of human dignity under Art. 1 sec. 1 GG, and resist altogether argumentation[1359] that puts forward the legitimacy deficit of the Federal Republic as a sound basis for not deciding the absolute prohibition of death penalty in view of constitutional law.[1360]

According to Art. 2 sec. 2 sent. 2 ECHR the right to life is limited in the event of death sentencing. Protocol No. 6 ECHR[1361] abolished death penalty, save in time of war (Art. 2 Protocol No. 6 ECHR). The more recent Protocol No. 13 ECHR abolished

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[1351] See Herdegen (n 1344) para 90
[1352] See ibid para 49
[1353] Cf. Engish, *Einführung in das juristische Denken*, 9. Aufl. (1997) 139
[1354] Herdegen (n 1344)
[1355] ibid
[1356] Dürig, Vorauflage, *Grundgesetz: Kommentar* (1958) para 16; Geddert-Steinacher, (1990) 81
[1357] For the scholarly controversy on whether the death penalty constitutes directly as such an affront to human dignity, see Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 143 fn 472
[1358] Herdegen (n 1344) 99
[1359] BVerfGE 18, 112 (117) [death penalty]; BVerfGE 60, 348, 354 [asylum law (Art. 16 sec. 2 sent. 2 GG) and extradition procedure]
[1360] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 48
[1361] Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the abolition of the death penalty as amended by Protocol No. 11 (28.4.1983)

death penalty in all circumstances.[1362] The major premise of legal syllogisms in ECtHR jurisprudence on issues of detention is mainly Art. 3 ECHR.[1363] Comparably, voices within the Supreme Court of the United States grounded reaction to death penalty on the cruel and unusual punishment Clause of the Eighth Amendment as an offense to human dignity.[1364] The Constitutional Court of Hungary has also abolished death penalty in October 1990[1365]. In 1995, *State v Makwanyane and Another*[1366], a landmark decision of the Constitutional Court of South Africa, ruled, on the basis of the incompatibility of death penalty with sections 9 (life), 10 (dignity), 8 (equality before the law and equal protection of the law), the invalidation of the relevant criminal law provision.

3. Analysis

In the *Life Imprisonment Case* the practice of the law of human dignity is inextricably associated with guaranteeing those sentenced to life imprisonment the hope to return to freedom and touches on the requirement of securing a dignified subsistence minimum to human beings deprived of their freedom. The ontological, linguistic-analytical and phenomenological portrayals spotlight different aspects of a story of 'something missing' in the text of the case under scrutiny.

a. Ontological

The ontological portrayal emphasizes law's anthropocentricism in light of the law of human dignity and fundamental rights, renders the distinction between the forced and the forceful unfolding of human beings' essence more tangible, and indicates that the traversal of limits in coming-into-being may be understood to operate on different levels.

i. Humanism: the practice of law not 'for its own sake'

[1362] Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (3.5.2002)
[1363] See Herdegen (n 1344) para 50
[1364] See *Furman v. Georgia* 408 U.S. 238, 306 (Brennan, J., concurring) ['Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison.']
[1365] Decision 23/1990
[1366] (CCT 3/94)

The task of criminal law is the protection of elementary values of community life[1367]. Still, the Hegelian proposition 'to honor the criminal through the punishment as [a human being] with reason' cannot stand, so it was argued, as grounds for 'the constitutional justification of punishment that deprives human beings of their dignity [*den Menschen seiner Würde beraube*[1368]] and excludes them for life from society'[1369]. The Court demarcated the realm of law as an independent field of production of meaning, that is, not necessarily adhering to interpretations of punishment coming from extra-legal, for instance philosophical, sources.

Criminal law cannot 'exercise compensation and justice for its own sake' [*Schuldausgleich und Gerechtigkeit um ihrer selbst willen zu üben.*][1370] The practice of criminal law is not self-referential not only due to the higher status of constitutional law vis-à-vis criminal law, but also – and most importantly – due to the meta-dimension of law on account of law's commitment to anthropocentricism. Humanism demands that the practice of law, even *per se* the law of human dignity, positions human beings 'in differing respects but always deliberately […] into a central place […]'[1371] as ends in themselves, instead of developing an autistic and self-referential *modus operandi*. The law of human dignity transcends instituted law; human dignity transcends its legal shell, yet without discarding it; equally, the concept of human dignity is transcended by human being-ness.[1372]

ii. Forced and forceful unfolding of human being-ness

[1367] BVerfGE 45, 187 (194)
[1368] The verb '*beraube*' [rob] has a poetic force and alludes to the forceful character of the deprivation.
[1369] BVerfGE 45, 187 (195)
[1370] BVerfGE 45, 187 (195)
[1371] Heidegger, 'Plato's Doctrine of Truth' 155, 181 [didactic stance]
[1372] We can only be certain of the empirical fact of a linguistic proposition stating the law of human dignity in the Basic Law and of the practice of that proposition in FCC jurisprudence. Yet, the mere presence of that language is of hermeneutic force. See Gadamer's reflections on words, Gadamer, *Truth and Method* (1975, 2004) 411 ['[…] it can […] happen that […] we do not use "the right word" for something because we do not recognize the thing. It is not the word that is wrong here but its use. It only seems to fit the thing for which it is used. In fact it is the word for something else and, as such, is correct. Likewise, someone learning a foreign language assumes that words have real meanings that are displayed in usage and conveyed in the dictionary. One can always confuse these meanings, but that always means using the "right" words wrongly. Thus we may speak of an *absolute perfection of the word*, inasmuch as there is no perceptible relationship – i.e. no gap – between its appearance to the senses and its meaning. […] The "truth" of a word does not depend on its correctness, its correct adequation to the thing. It lies rather in its perfect intellectuality – i.e., the manifestness of the word's meaning in its sound. In this sense all words are "true" – i.e., their being is wholly absorbed in their meaning […]'

The damaging consequences of life imprisonment on the personality of the offender are viewed in the *Life Imprisonment Case* as extraordinarily severe interference with fundamental rights, specifically of the right to personal freedom guaranteed under Art. 2 sec. 2 sent. 2 GG[1373]. On account of its invasive character, life imprisonment sentencing can be rendered as an instantiation of *polemos*. Forcing the *polemos* occasions an unfortunate happening of the irruption of Being. Human beings are forced outside their essence. The deprivation of freedom and the *a priori* denial to the offender of a chance to return to freedom in the future interfere with human dignity, besides – obviously – with liberty, in that they are 'forceful'; it is 'how' the denial of liberty takes place that substantiates the infringement on human dignity.

The forceful deprivation of freedom evinces human being-ness *ex negativo*. Violations of fundamental rights intimate perversely who the human being is, that is, by portraying the intrusion on human being-ness[1374]. Any such infringement can be perceived as an instance of *polemos*; consequently, aspects of the *φύσις* of the human being are disclosed. What is impaired by forceful disclosure is self-determination or, in ontological terms, the integrity of the unfolding of human being-ness. Forcing the *polemos* conflicts with 'meditating and caring, that human beings be human and not inhumane, 'inhuman,' that is, outside their essence.'[1375]

> Forcefully depriving [*entkleiden*] the human being of [his or her] freedom without at least preserving a chance for him to potentially someday become partaker of freedom would be inconsistent with this understanding of human dignity. [1376]

The poetic consistency of the word *'entkleiden'*, namely 'to unclothe', captures how the particular encroachment on human dignity compromises human being-ness; failure to guarantee human dignity strips human beings of their essence, leaving them – metaphorically put – naked. The 'forceful' character of the deprivation consists in that it thwarts the self-determination of the individual. The *Life Imprisonment Case* illustrates vividly the traumatic event of being forcefully deprived of freedom without maintaining the hope to potentially regain freedom.

[1373] BVerfGE 45, 187 (223)
[1374] BVerfGE 45, 187 (228) ['The demand of respect for human dignity means particularly that cruel, inhuman and degrading punishments are prohibited [cited cases omitted].']
[1375] Heidegger, 'Letter on Humanism' 239, 244
[1376] BVerfGE 45, 187 (229)

'Forceful' deprivation may also imply the force of law *per se*.[1377] Criminal law constitutes a different cloak of force[1378] than fundamental rights, and garbing law's *Menschenbild* and the meaning of human dignity in the one or the other cloak begets distinct significations and significance. The above excerpt triggers a figurative representation of the hierarchy between the law of human dignity, that is, the backbone of constitutional law, and criminal law as different strata in a multi-layered system of force. The law of human dignity can be understood as the fortress of law's humanism, precisely because it transcends its legal shell. Since law *per se* constitutes a cloak of force that transforms perspective into being, legal actors should be on the alert for instances of dehumanization through law.

iii. Traversal of limits

The disclosure of *φύσις* permits the ascertainment of being, namely the most emphatic form of a 'reminder of ought'.[1379] In light of the ontological insights put forward in Chapter One, 'ought' refers to securing to every human being the possibility of traversing limits in the process of unfolding. Are human beings human within the realm of law? There is no self-evident response to that question; *ad hoc* evaluation in a spirit of critical reflection is called for. How is the forceful deprivation of freedom without a chance to reenter society or, reversely, the guarantee of a chance to regain freedom ontologically portrayed as an aspect of human dignity meaning in the life imprisonment context?

> The verdict 'for life' *stricto sensu* means the definite expulsion of the offender from the society of free citizens. [1380]
> […] The sentence of life imprisonment cannot be enforced meaningfully if the prisoner is denied *a priori* any prospect of returning to freedom. [1381]

The particularity of *stricto sensu* life imprisonment sentencing lies in the definiteness of expulsion from a life in freedom, ergo the conclusiveness of the unavailability of space that could be occupied by the offender in the society of free citizens in the future; no 'part' in the realm of fundamental rights corresponds to

[1377] MacKinnon, *Toward a FTS* (1989) 237 ['[…] law is a particularly potent source and badge of legitimacy, and site and cloak of force.']
[1378] ibid
[1379] Kunig, Art. 1, *GG Kommentar* (2012) para 1 ['die Feststellung des Seins als nachdrücklichste Form einer Anmahnung des Sollens.']
[1380] BVerfGE 45, 187 (223)
[1381] BVerfGE 45, 187 (250)

'those who have no part'[1382]. Consequently, *polemos* or dissensus remain uncalled for, and the irruptive traversal of a limit is ruled out, as the limit between life in detention and life among free citizens cannot be traversed 'for life'. Conversely, the lack of space denotes absence of a subject of fundamental rights and incapacity 'for staging scenes of dissensus'[1383]. The irruptive disclosure of the essence of the human being imprisoned 'for life' is the last, ontologically termed, *ex negativo* revelation of human being-ness and, as a result, the final occupation, literally and figuratively, of a space by the offender, rather than a phase in the movement to and fro between concealing and revealing one's essence. Life imprisonment *stricto sensu* can effectively deny the offender the status of the subject of fundamental rights. In addition, the FCC held that if the prospect of returning to freedom is *a priori* foreclosed, the enforcement of the sentence of life imprisonment could not be meaningful. How is the meaningfulness of life imprisonment understood in light of the ontological account of the law of human dignity?

> Respect and protection of human dignity belong to the constitutional principles of the Basic Law. […] This is based on the conception of the human being as a spiritual-moral being, invested with the freedom to determine and unfold [him or herself] [*sich zu entfalten*]. [1384]

Life imprisonment is meaningful provided it does not perpetually impede the unfolding of the *φύσις* of the human being, or as the Court put it, '[…] the core of human dignity is struck if the offender, regardless of the development of his personality, must abandon all hope of regaining his freedom.'[1385] In freedom, the self-determined unfolding [*'sich […] entfalten'*] happens in the irruptive movement from concealment to coming into the unhidden, that is, coming-into-being. This is in harmony with a certain conception of law's *Menschenbild* that encompasses the spiritual and moral dimension of human being-ness. The offender under the sentence of life imprisonment is deprived of freedom on criminal law grounds. 'something missing' as an aspect of the law of human dignity marks the space secured within the realm of fundamental rights for the offender to institute him or herself as a legal subject or, more fundamentally, to be human.

[1382] Rancière, *Dissensus* (2010) 35
[1383] ibid 69
[1384] BVerfGE 45, 187 (227)
[1385] BVerfGE 45, 187 (245)

The damaging effects of life imprisonment on the personality of the offender should be counterbalanced and counteracted at various levels and by a combination of appropriate measures. The distinctive meaning of the law of human dignity in the *Life Imrpisonment Case*[1386] being the prospect, 'chance', or 'hope' of returning to freedom, practicing that law means delivering upon the duty to rehabilitate the offender in order to increase the possibility of the return to a life in freedom on the part of the state. The FCC referred to the 'substantive limitation of the danger of serious damages in the personality'[1387] through the practice of pardon, and, more generally, the 'introduction of the possibility of an earlier release.'[1388] With respect to rehabilitation measures the Court noted:

> The interest in the offender's rehabilitation flows from Art. 2 sec. 1 GG in conjunction with Art. 1 GG. The convicted offender should have the chance to reenter society after atoning for his crime [cited cases omitted]. [1389]

Rehabilitation is the state's response to the stipulation that the 'chance to regain freedom at a later point in time' be 'concrete and in principle also realizable'[1390]. The duty of the state to respect and protect human dignity is thereby delivered upon during the execution of life imprisonment sentencing. The requirement of a 'concrete and in principle also realizable' chance underscores the correspondence between the humanism and the pragmatism of law. Cultural criticism reconciles humanism and pragmatism by implying that 'far from excluding aesthetic and expressive considerations, […] instrumental policy analysis has a constitutively important expressive dimension that literary reading can illuminate.' Binder and Weisberg argue that '[t]he best cultural studies of law reveal how policy decisions may reshape the expressive possibilities and social identities available to individuals,

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[1386] BVerfGE 45, 187 (228) ['From Art. 1 sec. 1 GG in conjunction with the principle of the social state derives the duty of the state – and this is valid especially for the execution of criminal penalties – to guarantee that existence minimum [*Existenzminimum*] that accounts for a decent existence [an existence in line with human dignity, *menschenwürdiges Dasein*] in the first place.']; The guarantee of a dignified existence minimum constitutes an equally important condition of life imprisonment, yet not a distinctive element of the meaning of the law of human dignity in the *Life Imprisonment Case*.
[1387] BVerfGE 45, 187 (238)
[1388] BVerfGE 45, 187 (250)
[1389] BVerfGE 45, 187 (239)
[1390] BVerfGE 45, 187 (245); ibid ['The review of the constitutionality of life imprisonment revealed that, particularly from the vantage point of Art. 1 sec. 1 GG and the principle of the rule of law, the implementation of the life imprisonment sentence in accordance with human dignity is only secured when the sentenced criminal has a concrete and in principle also realizable chance to regain freedom at a later point in time; […]']

thereby conditioning the preferences considered by conventional policy analysis.'[1391] The duty to rehabilitate and resocialize originating in the inviolability of human dignity and how these are implemented call for an approach through this prism.

Rehabilitation and resocialization measures deal with the damaging effects of detention on the personality and prepare prisoners for a life in freedom[1392], but can also be understood to serve as impetus for unfolding and – as it has been ontologically framed – traversing limits at the spiritual level while physically confined within the space of prison. The latter ends presuppose a multidimensional portrayal of law's *Menschenbild* – both spiritual and physical. The compatibility of life imprisonment sentencing with the Basic Law and the alignment of its execution with the law of human dignity are conditional on whether the possibility to unfold and traverse limits is upheld.

> Prisons are under the duty to strive towards the resocialization of prisoners sentenced to life imprisonment, to maintain their ability to cope with life and to counteract the harmful effects of deprivation of freedom and also, and most importantly, the thereby caused impairing changes in personality. The constitutional soundness of this implementation [of life imprisonment] derives from the inviolability of human dignity as guaranteed in Art. 1 sec. 1 GG.[1393]

Minding that Art. 1 sec. 1 GG institutes both a state duty and a claim to respect for and protection of human dignity, the duty of the state to rehabilitate and resocialize the prisoner would be incomplete without a corresponding claim on the part of the one convicted to life imprisonment.

> Assuming that the chance of ever being able to regain his freedom must in principle always remain for the one convicted to life imprisonment, he must also, consequently, be entitled to a claim to rehabilitation, for it may even take serving the sentence for a long time to get the chance, to have to set up a life in freedom [cited case omitted]. [1394]

From an ontological perspective, the entitlement to a claim to rehabilitation is yet another substantiation of law's humanism in that it ameliorates the initiation and

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[1391] Binder & Weisberg, *Literary Criticism of Law* (2000) 19 ['Cultural criticism of law demands that normative argument defend institutions on the basis of the kind of identities they will cultivate rather than their ability to protect or accurately represent existing personalities.']
[1392] BVerfGE 45, 187 (239) ['Because, even in such cases, the enforcement of the penalty can set the requirements for the achievement of a release, and facilitate the reintegration of the offender into society.']
[1393] BVerfGE 45, 187 (238)
[1394] BVerfGE 45, 187 (239)

happening of the self-determined, irruptive process of movement from concealment to unconcealment that is elemental[1395] to instituting human being-ness within the realm of law and preserving law's humane practice. The nexus between the humanism and the pragmatism of law is manifested in concretization of the claim to human dignity as the claim to a concretely and realistically attainable chance to regain freedom.

iv. The disruption of identity apropos changing context

The Court panegyrized law's humanism noting, 'always-milder punishments have replaced those more cruel in character, and that progress is directed from more crude towards more humane.' [1396] The important insight that dissensus, through the demonstration of a certain impropriety, disrupts identity suggests the Court's engagement in self-reflection, explored in more depth in the phenomenological account of human dignity. The ontological account of the law of human dignity put forward in Chapter One permits the identification of the disruption of identity involved in the process of critical self-reflection in the text of the *Life Imprisonment Case*. The Court resorted to the historical evolution of criminal justice to justify the constitutional admissibility of life imprisonment as opposed to death penalty, hence, testified the evolution of an I as *ipse* rather than *idem*. The FCC asserted the relevance of historical context and background and the influence of up-to-date knowledge on the evaluation of the sentence to life imprisonment 'particularly in view of the standards of human dignity and the rule of law.'[1397] Historical evolution features as an inseparable aspect of human dignity meaning.

b. Linguistic- analytical

Compatibility of statutory law with the constitution, particularly so with the law of human dignity as the critical lens through which to look at the world and produce meaning, can be rendered in view of linguistic-analytical insights as subsumption under a legal language game. The linguistic-analytical portrayal ensues from the identification of the language that contours the human image of the criminal and conveys the meta-dimension of law and of the range of viewpoints comprised in

[1395] Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics' 183, 230 ['[…] the κρύπτεσθαι of φύσις is not to be overcome, not to be stripped from φύσις. Rather, the task is the much more difficult one of allowing to φύσις, in all the purity of its essence, the κρύπτεσθαι that belongs to it.']
[1396] BVerfGE 45, 187 (229)
[1397] BVerfGE 45, 187 (227)

the legal language game. Diverse viewpoints within the state, as the Wittgensteinian eye, are occasioned by the principle of the separation of powers and may be understood as signifying the operation of a self-reflection mechanism. Resorting to tautology or equation in the thought of Wittgenstein, I offer an alternative understanding of key themes in the legal discourse on human dignity. The linguistic-analytical portrayal of the Life Imprisonment Case demonstrates how the boundaries of the legal language game fluctuate in the process of negative delineation.

i. Compatibility with the constitution as subsumption under a legal language game

The constitutional relevance of concerns arising from § 211 StGB is premised on a restrictive interpretation of the Basic Law, which can be portrayed in light of the linguistic-analytical model as a narrow legal language game demarcated by rigorous boundaries. In deciding on the constitutionality of life imprisonment, the FCC reviewed the relevant statutory law and, among other arguments brought forth by state organs, the reasons for the District Court's referral. The FCC attended to the data and range of opinions at its disposal and set the frame within which life imprisonment sentencing is constitutional. The Basic Law ubiquitously determines the legal language game, its boundaries and content, and is considerably formative of the viewpoint of the constitutional judge looking through it as a lens[1398]. Whether statutory law conforms to the constitution is understood in linguistic-analytical terms as a question about the possibility of subsumption of the former under legal language games emanating from an eye that looks through the lens of the Basic Law.

What is mirrored in legal texts constitutes, as repeatedly noted, just one aspect of the practice of the law of human dignity. The text of judicial decisions portrays in written form only the outcome of the process of judicial interpretation, perceived in the present analysis principally as a hermeneutic and literary process. The language that appears in the text has already been polished and fine-tuned, drafted and re-drafted to mirror subsumption or non-subsumption, that is, the constitutional compatibility or incompatibility of the statute under scrutiny. The competence of judges as authors and the responsibility to render constitutional compatibility

[1398] Schnapp (1989) 1, 8

demonstrable is of profound pertinence to doctrinal, legal-sociological, and hermeneutic and literary approaches to law.

It is worth exploring the extent to which phrasing associations reflect the transposition of concerns from one frame to another, at present from criminal law to fundamental rights. The FCC stressed the extraordinary and severe character of the infringement on the fundamental rights of those sentenced to life imprisonment and stated that due to the exceptional intensity of the invasion of personal freedom guaranteed under Art. 2 sec. 2 sent. 2 GG the sentence is located at the very top of the catalogue of criminal penalties[1399]. The far-reaching effects of the invasion render 'the gravity and importance of the constitutional law question clear.'[1400] Targeted emphasis on the high degree of intensity and the sweeping implications of the invasion aims at portraying and conveying the significance of the infringement.

The implementation of life imprisonment sentencing should abide by the law of human dignity. The FCC stated, '[i]n all this, one thing should not escape one's attention [*darf nicht aus den Augen verloren werden*]: the dignity of human beings is something indispensable [*etwas Unverfügbares*] […]'[1401]. The law of human dignity, concluded the Court, demands that the penal system in principle provides the possibility to regain freedom. A literary perspective on the text of the case qualifies drawing hermeneutically impactful parallels between the Court's phrasing choices – as benign as these may seem from a doctrinal standpoint – and Wittgenstein's eye and field of sight simile. Compatibility with the constitution can be rendered as subsumption under a legal language game. The law of human dignity should not escape one's attention; it is an indispensable aspect of the meaning produced and decisive in judging the subsumption under the legal language game.

Human dignity, concluded the Court, 'is only secured when the sentenced criminal has a concrete and in principle also realizable chance to regain freedom at a later point in time.'[1402] Having in principle a chance to return to a life in freedom is paired with the entitlement to 'a claim to rehabilitation, for it may even take serving the sentence for a long time to get the chance, to have to set up a life in freedom

[1399] BVerfGE 45, 187 (223)
[1400] BVerfGE 45, 187 (223)
[1401] BVerfGE 45, 187 (229)
[1402] BVerfGE 45, 187 (250)

[…]'[1403]. The claim to rehabilitation renders 'realizable' the law of human dignity by activating the viewpoint of another metaphysical subject within the legal language game, and, what is more, also during the execution of the sentence.

ii. The range of viewpoints within the legal language game

A range of viewpoints can be identified in the legal language game portraying the *Life Imprisonment Case.* The FCC noted the legislature's insistence on life imprisonment sentencing and the embracement of this punishment by society at large and by jurisprudence as 'self-evident', despite concerns expressed by the Great Criminal Law Commission and scientists[1404]. In fleshing out the legal language game, the FCC drew on the current state of knowledge about the repercussions of the sentence of life imprisonment so as to perform an informed assessment of the gravity of psychical and physical damage caused to the imprisoned human being. Another viewpoint naturally taken into account was that of the District Court. Regardless of whether these points of view generate language games or legal language games, their inclusion in the text of the *Life Imprisonment Case* illustrates the breadth and content of the legal language game emanating from the viewpoint of the FCC as author of the decision. The expansion of the legal language game and the stretching of its boundaries reflects the effort to comprehensively survey facts and figures as well as opinions in the discourse across disciplines with a view to sharpening, refining and updating the appreciation of the subject matter[1405] and thereby justifying – not just argumentatively, but also hermeneutically – the authority of its viewpoint[1406] over the meaning produced.

The FCC questioned the methodological soundness and objectivity of the findings on which the District Court grounded the argument about damages caused by

[1403] BVerfGE 45, 187 (239); ibid ['Because, even in such cases, the enforcement of the penalty can set the requirements for the achievement of a release, and facilitate the reintegration of the offender into society.']
[1404] BVerfGE 45, 187 (194)
[1405] BVerfGE 45, 187 (195) ['[…] the current understanding of criminal justice']
[1406] The legitimacy of the Court's authority over meaning is grounded of course in the foundational institutions of every democratic constitutional order; these are not disregarded here. Rather, the present hermeneutic and literary methodological premises encourage placing emphasis on the text of the legal arguments employed. Indeed internal and external justification requires the demonstration of surveyance of a given subject matter or discourse. In hermeneutic terms, the broader the scope of the surveyed field, the sounder the argument furthered and the meaning produced. In literary terms, the language employed determines the quality of the portrayal and the clarity of meaning, which is the ultimate goal of any linguistic-analytical discourse. See Alexy, *A Theory of Legal Argumentation* (1989) 221ff. [internal and external justification]

life imprisonment to the personality of the prisoner and incorporated scientific positions from the discourse on the subject matter, namely insights into the effects of the sentence according to theoretical and empirical studies[1407], and the opinions of experts presented to the Court at the hearing. 'Established findings' showing that, in practice, 'the full serving of life imprisonment is a rare exception […]'[1408] constitute sources of external justification of the Court's legal argumentation. Such sources ameliorate the soundness of associations in legal argumentation; from a linguistic-analytical perspective, they enrich the language composing the legal language game with material found outside its boundaries, yet necessarily within the field of sight of the constitutional judge. For example, the definition of harm is grounded on empirically acquired knowledge[1409], 'the experience that a protracted imprisonment means extraordinary psychical and physical distress and can lead to significant impairment of the personality structure of the prisoner', which explains the 'introduction of the possibility of an earlier release'[1410]. The advancement of an understanding premised on lived experience could be figuratively rendered through the linguistic-analytical model as an expansion of the boundaries of the legal language game.

The Court moreover considered theoretical approaches to the subject matter, namely theories on punishment particularly apropos the *telos* of criminal law sentencing. According to the – time-honored in criminal law and the jurisprudence of German courts – unification theory [*Vereinigungstheorie*] the purposes of punishment, rehabilitation, retribution, atonement, and prevention of crime or protection of the society are unified and balanced in criminal law sentencing[1411]. The FCC did not join the District Court in the latter's criticism of life imprisonment sentencing as unjustified punishment on the grounds that it does not serve the aforementioned purposes. That the discord between the FCC and the District Court falls back on a theoretical account of punishment indicates the significance of

[1407] BVerfGE 45, 187 (229ff.)
[1408] BVerfGE 45, 187 (241); ibid ['Those condemned to life imprisonment are – with the exception of a few cases, where the social prognosis is unfavorable, and reasons of public security are offered for continuing to serve the sentence – released earlier by means of the practice of pardon.']
[1409] See another example of the experience of harm and a description of that experience as 'intangible' and 'invisible', in MacKinnon, *Are Women Human?* (2006) 14 ['Sexual violation is a crime of inequality of status […]. It dehumanizes. No material recompense or punishment can restore its intangible, invisible harm.']; 57 ['[…] the harm of second-class human status does not pose an abstract reality question.']
[1410] BVerfGE 45, 187 (250)
[1411] BVerfGE 45, 187 (253)

incorporating theory into the legal language game to open up new fields of dissensus within its boundaries and to gain refinement and depth of meaning through critical reflection. The FCC argued that the sentence of life imprisonment is not disproportionate as a punishment for murder[1412].

The Court scrutinized 'the content and the impact of the sentence to life imprisonment'[1413] and found no violation of Art. 1 sec. 1 GG. The constitutional judge expressed the willingness to approach the case in a manner 'consistent with the wording' of the challenged statutory provision and to produce 'a reasonable meaning' attuned to 'the identifiable purpose of the law'[1414]. Eventually, the FCC responded to the question of constitutionality brought before it in the affirmative. Although the *Life Imprisonment Case* was deemed 'a question of simple statutory interpretation' and, as such, 'a matter for the competent and responsible [*zuständigen*] criminal courts'[1415], the FCC still included in its legal language game illustrative alternative courses of interpretation, stressing however the non-mandatory character of any single interpretation, since 'the wording and the meaning of this provision allow for an even narrower interpretation ensuring that even in […] extreme cases no disproportionate punishment must be imposed […]'[1416]. These variants signify the profound enrichment and expansion of the legal language game. At the same time, they underline the distinction between hermeneutically and literary defined authority over meaning and authority associated with legal effects, granted of pertinence to the purposes of mainstream doctrinal accounts.

iii. The decisive lens, the decisive viewpoint, constitutional review and the principle of the separation of powers as a self-reflection mechanism, critical reflection and practicing the law of human dignity in context

Applying the linguistic-analytical model, the judge is, by analogy with the metaphysical subject, at the limit of the legal language game, and can be viewed as the eye in Wittgenstein's simile. Even when certain phrasing, for instance abstraction or passive voice syntax, conceals the legal actor practicing the law, effectively giving the impression of identification of the judge with the law or – figuratively rendered –

[1412] BVerfGE 45, 187 (254)
[1413] BVerfGE 45, 187 (229)
[1414] BVerfGE 45, 187 (267)
[1415] BVerfGE 45, 187 (267)
[1416] BVerfGE 45, 187 (267)

of the merging of the eye with the lens attached to it, the decisive viewpoint is still that of the author of the legal text. Imagine law as a lens set before the eye, defining the eye's outlook on life. The figurative rendering indicates how legal language games are just part of a broader field of sight, our world; more precisely, how the judge by analogy with the metaphysical subject sees through the lens of law, but can also look at the world without it, through other lenses[1417]. Practicing the law of human dignity can be portrayed as a *sui generis* language game, a legal language game within the – unlimited for the eye – field of sight corresponding to the world, language.

In the *Life Imprisonment Case,* the Court determined the latitude of the legislature[1418] to exercise its powers framed in hermeneutic and literary terms as the authority to produce meaning. The right to personal freedom is not absolute; 'in conformity with Art. 2 sec. 2 sent. 3 GG it can be limited by an act of parliament.'[1419] In exercising authority over meaning the legislator 'is limited in several respects.'[1420] The inviolability of human dignity under Art. 1 sec. 1 GG is the determinant of the meaning produced.

> The legislature, in exercising the powers granted to it, must take account of both the inviolability [*Unantastbarkeit*] of human dignity (Art. 1 sec. 1 GG), the highest principle of the constitutional order, and further constitutional norms, in particular the equality provision (Art. 2 sec. 1 GG) and the requirements of the rule of law [*Rechtsstaatlichkeit*] and the social state (Art. 20 sec. 1 GG). [1421]

Life imprisonment raises not only legislative but also criminological and political considerations regarding the role of criminal law in modern society. In appreciation of the multidimensionality of the subject matter the FCC deferred to the legislature for decisions on issues exceeding the constitutionally determined boundaries of its authority over meaning[1422], The legal-sociological underpinnings of the boundaries demarcating hermeneutical authority should not escape our attention;

[1417] See a methodological remark in Baer, *Rechtssoziologie* (2011) 12 ['Mit Hilfe der Rechtsforschung kann Justitia, die häufig mit der Binde vor den Augen dargestellt wird, eine Brille aufsetzen.']
[1418] Schnapp (1989) 1, 8 ['Das vom *BVerfG* bei der Überprüfung von Gesetzen praktizierte Prinzip des sog. judicial self-restraint trägt der aus der parlamentarisch-demokratischen Struktur der Verfassung sich ergebenden politischen Gestaltungsfreiheit des Gesetzgebers gebührend Rechnung; es beugt einer Politisierung der Justiz ebenso vor wie einer Judifizierung der Politik.']
[1419] BVerfGE 45, 187 (223)
[1420] BVerfGE 45, 187 (223)
[1421] BVerfGE 45, 187 (223)
[1422] BVerfGE 45, 187 (223f.)

the boundaries stand for the scope of competence and responsibility in view of constitutional review and the principle of the separation of powers as a self-reflection mechanism of the constitutional democratic state.

The process of critical reflection on the humane practice of the law of human dignity guarantees humanism in that it entails attentiveness to the field of sight and the viewpoints of metaphysical subjects present within it. 'Law in context' approaches convey engagement in reflection on the relevance of the legal language game to the content of the field of sight beyond its boundaries. The constitutional admissibility of the sentence to life imprisonment, according to the Court's view, is bound with historical context.

> New insights may influence, or even convert the evaluation of this sentence particularly in view of the standards of human dignity and the rule of law. [1423]
> The history of the criminal justice system clearly shows that always-milder punishments have replaced those more cruel in character[1424], and that progress is directed from more crude towards more humane, and from simpler towards more sophisticated/differentiated forms of punishment, and [from this evolution] it is clear which path should be followed. [1425]

Critical reflection presupposes the possibility of interaction between the eye's broader field of sight and the legal language game. That the standards of human dignity and the rule of law require or, more modestly, provide scope for the meaning of life imprisonment sentencing to feed on new insights ensuing from other fields affirms that critical reflection is the *modus operandi* of the law of human dignity. New insights brought to the light become part of the world as we know it, namely of what 'can be expressed in language'[1426] and lies within the field of sight. These insights are not necessarily at once mirrored in the subtotal of the field of sight, that is, the legal language game.

The FCC noted that courts' jurisprudence had been lagging behind the 'increasingly lively' debate developing within scientific literature. Criminal courts held life imprisonment sentencing constitutionally admissible yet, as the FCC

[1423] BVerfGE 45, 187 (227)
[1424] BVerfGE 45, 187 (249) [The FCC pointed to a new trend in lawmaking in the 1974 draft of the Federal Ministry of Justice for the Fifteenth Amendment to the Criminal Code, namely the provision of certain latitude to reevaluate the sentence to life imprisonment after a period of the time was served with the consent of the offender]
[1425] BVerfGE 45, 187 (229)
[1426] Wittgenstein, *Tractatus*, (6.43)

observed, 'without further discussion.'[1427] The 'striking'[1428] discrepancy between law and context can be portrayed – hermeneutically and literary – as 'something missing' by analogy with the concept of the *Leerstelle*. The mere identification and depiction of aspects of this inconsistency causes the expansion of the boundaries demarcating the legal language game in the *Life Imprisonment Case*[1429], and hints at areas of discourse on which to draw to fill 'something missing'. By recourse to context, legal actors can *ad hoc* construe the meaning of 'something missing' within scope of their competence and responsibility. Meaning is necessarily also ethical as the product of legal actors' good or bad willing[1430], which can change the limits of the legal language game, thereby rendering it quite another. The legal language game being a subtotal of the world, the process of rendering the realm of law quite another entails deriving insights from law's context, namely from the space within the limits of our language, that is, the broader field of sight; accordingly, the perspective on the world changes.[1431]

The law of human dignity as the decisive lens, the viewpoint ensuing therefrom and the world of the metaphysical subject within the institution of the constitutional judge are mutually reflexive[1432]. The hermeneutic insight that 'method and object cannot be separated: method has already delimited *what* we shall see […]'[1433] should inform the portrayed mutual reflexivity.

[1427] BVerfGE 45, 187 (225)

[1428] BVerfGE 45, 187 (224) ['Dabei fällt auf […]']

[1429] See BVerfGE 45, 187 (225ff.); The Court's authority over the production of meaning translates also into the latitude to choose among available interpretation canons. In other words the linguistic-analytical portrayal of the legal language game does not necessarily involve expansion or contraction of boundaries and enhancement with insights deduced from the rest of the field of sight. In the *Life Imprisonment Case* the *travaux preparatoires* and the history of deliberations in the lawmaking process were not considered critical in deciding the question referred to the FCC by the District Court. Legislative history and the framers' ideas and motivation were not deemed decisive influences on the interpretation and understanding of the Basic Law provisions under scrutiny.

[1430] The pertinence of the responsibility and the good or bad willing of actors – secondarily also legal actors – to the guarantee of human dignity is particularly perceptible in the context of biomedicine and biotechnology. See Böckenförde (2003) *JZ* 809, 809 ['Verantwortbarkeit von Stammzellenforschung']

[1431] Insights into the change of perspectives can be drawn from the discussion of perspectivism in Binder & Weisberg, *Literary Criticism of Law* (2000) 468 ['[…] to develop a new interpretive perspective is no casual matter since it means living one's life differently. […] Though there cannot be a complete theory of that explains everything, the world does have a distinct character at particular times in history because certain perspectives become dominant over others.']; Wittgenstein, *Tractatus,* (6.43)

[1432] The latitude of the judge as communicated, for instance, in the '*Spielraumtheorie*' alludes to the metaphysical subject, that is, the human factor, within institutions. See Badura (1964) *JZ* 337, 343

[1433] Palmer (1969) 23 ['It [method] has told us what the object is *as* object. For this reason, all method is already interpretation; it is, however, only one interpretation, and the object seen with a different method will be a different object. […] Explanation will certainly rely on the tools of objective analysis

The FCC admitted that the absolute threat of punishment contributes to 'legal certainty and uniform punishment of offenders […]'[1434], particularly in a crime as serious as murder. While 'the imperative of substantive justice is a justified request working towards an as uniform as possible criminal law practice […]'[1435], reservations re the results of 'the use of a rigid threat of punishment' emphasizing the 'therein-lying schematism in the specific case'[1436] were also expressed. The constitutionality of the absolute threat of punishment as severe as life imprisonment is conditional on 'the possibility of openness in performing the subsumption of concrete cases under abstract norms to assert the punishment that is consistent with the constitutional principle of proportionality'[1437]. In other words, the initiation of concrete cases into the legal language game can cause its boundaries to flux, to the extent that the language introduced can be subsumed under the abstract norms. This portrayal shows that not only the lens attached to the eye, but also the world extending from the eye shapes meaning (see *infra*, phenomenological analysis of the relation of the self to the world). The association of the practice of the law of human dignity with concretization so enthusiastically emphasized in German legal doctrine indicates that shaping meaning in 'performing the subsumption of concrete cases under abstract norms' also signifies transforming meaning.[1438]

Minding that the 'human' component in human dignity language suggests the metaphysical subject at the limit of the field of sight, and that in judicial practice the decisive viewpoint is that of the judge as institution and human being, it is consequential to claim that new insights can cause the world – for present purposes the world extending before the judge's eye – to change. In the proposed model, law ubiquitously permeates the entire legal language game. Most importantly it decisively defines the viewpoint of the judge[1439]. Consequently, law determines to a considerable extend the language employed in FCC jurisprudence and the breadth and rigidness of

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but the selection of the relevant tools is already an interpretation of the task of understanding.']; See Grimm, 'Methode als Machtfaktor' (1982) 469

[1434] BVerfGE 45, 187 (260)

[1435] BVerfGE 45, 187 (261)

[1436] BVerfGE 45, 187 (261)

[1437] BVerfGE 45, 187 (261)

[1438] BVerfGE 45,m 187 (261) ['This is however possible – as the hearing has revealed – under the requirements of the general part of the Criminal Code and in the manner of a constitutionally conforming restrictive interpretation of § 211 StGB, particularly of the elements 'insidious' [*heimtückisch*] and 'in order to conceal another crime'.']

[1439] Stürner (1998) 317, 330 [Discussing the *'Kind als Schaden'* problem (see *infra,* Chapter Two, Part B, *Abortion I Case*), Stürner noted under conclusion 6, reference is made to the constitutional limits of judicial competence [*die verfassungsrechtlichen Grenzen justizieller Kompetenz*].

the boundaries of legal language games. The disparity between legal language games that do not reflect the evolution occurring in life, in other words resist the introduction of new language within their boundaries, and the rest of the field of sight, where change eventuates, signifies disregard for maintaining the pertinence of law to life and for respecting the human factor. Such disparity indicates the inhumane practice of law.

The portraits of the judge and the legislator hint at the human dimension of institutions as the underlying cause of diversification among viewpoints even when all possibly responsible variables in the legal language game are fixed and similar. The FCC identified a further diversification factor that interferes with the aspiration of uniformity. Appealing to lived experience[1440], the FCC observed that 'penalties differ, indeed not insignificantly, from court to court even when the circumstances are similar […]'[1441], and that 'the judge is generally milder than the legislator and sometimes prone to avoid the most severe punishment as much as possible in those cases where the legislator would want to know they [the most severe punishments] are applied.'[1442] The observation of diversification among viewpoints and therefrom-ensuing legal language games, even within the same branch of state power and in response to similar circumstances, is paired with the identification of traits of human being-ness in the conventional images of the judge and the legislator. From a hermeneutic and literary perspective, the anthropomorphism in the language employed by the FCC to juxtapose stereotypical interpretive stances of the judge and the legislator towards the necessity of uniform punishment can be understood as an intimation of the human factor facet of the respective institutions. The words 'milder' and 'prone' allude to human attitudes. The certainty and uniformity guaranteed through the absolute threat of punishment clash with the unavoidable variety of metaphysical subjects' viewpoints manifested in practicing the law and the traits of collectivities of metaphysical subjects within a single institution, signified at times as legal and institutional culture.

[1440] See BVerfGE 45, 187 (261); The empirical premises of the Court's remarks are asserted without further explication of their foundations and methodological soundness. The Court went on to add that '[t]he higher the statutory penalty, the greater this tendency [of the judge being milder than the legislator in imposing severe punishment] becomes' citing, however, legal literature in support of this empirical observation.
[1441] BVerfGE 45, 187 (261)
[1442] BVerfGE 45, 187 (261)

The law of human dignity delineates the role of the judge and the authority over meaning. Foreclosing access to what lies outside the legal language game would render the perception of the judge as a metaphysical subject – prior to and besides an institution – void. The meta-dimension of the law of human dignity 'shows' in the crossing of the boundaries of the legal language to examine the consistency of law with life. Critical reflection sparked by new insights is the process of the humane practice of the law of human dignity and at once guaranteed by that law. The practice of the law of human dignity guarantees that respect is accorded to the perspectives of metaphysical subjects where these are traced in the linguistic-analytical model. Law becomes inhumane when it fails to trail the evolution that takes place in life, particularly the evolving meaning – both significance and significations – of human being-ness. Apropos the criminal justice system the FCC noted the advancement 'from more crude towards more humane […] forms of punishment.'[1443] Each instance of practicing human dignity language in law can be understood as a reminder of the therein-inhering guarantee of law's humanism. From a linguistic-analytical perspective, respecting and protecting human beings *qua* beings translates into recognizing that metaphysical subjects stand at the limit of the world, in other words precede their world, thus have authority over the meaning of all that their field of sight comprises.

iv. Tautology and inviolability

The linguistic-analytical tools available permit an understanding of inviolability [*Unantastbarkeit*] in light of tautology. Inviolability expresses the guarantee of dignity to human beings by virtue of being human. This tautological proposition does not correspond to a picture of reality[1444], because it 'allows every possible state of affairs'[1445], just as human dignity inheres in every human being.

> (4.462) […] In the tautology the conditions of agreement with the world – the presenting relations – cancel one another, so that it stands in no presenting relation to reality.
> (4.463) […] Tautology leaves to reality the whole infinite logical space; […]
> (4.464) The truth of tautology is certain, of propositions possible, of contradiction impossible. (Certain, possible, impossible: here we

[1443] BVerfGE 45, 187 (229)
[1444] Wittgenstein, *Tractatus,* (4.462)
[1445] ibid

> have an indication of that gradation which we need in the theory of probability.)[1446]

The proposition of the law of human dignity is tautological precisely because it holds true 'for all the truth-possibilities'.[1447] Wittgenstein adds, '[t]he proposition shows what it says, the tautology and the contradiction that they say nothing.' [1448] The tautology is unconditionally true, that is, 'has no truth-conditions' and is 'without sense'[1449]. Be that as it may, and this is an especially important remark for present purposes, tautology is 'however, not senseless'. Tautology 'is part of a symbolism'[1450] and does not portray reality. Propositions of logic 'show in tautologies' the logic of the world.[1451] Along similar lines, the '*absolute Metapher*' characterization of human dignity sheds underlines how independence from reality amounts to the non-requirement of justification of violations.[1452]

> (5.142) A tautology follows from all propositions: it says nothing.[1453]

In light of a strict linguistic-analytical understanding of the tautological propositions stating the law of human dignity are without sense, yet, not senseless, rather symbolical. This strict reading of the law of human dignity, particularly as in the German constitution, cannot take us too far with our reasoning. This law has more than merely a symbolic impact as practiced in FCC jurisprudence and as discussed in German legal doctrine. Framing the law of human dignity as a tautology, rendering it inviolable [*unantastbar*], exempts its practice from the sphere of possible propositions composing legal arguments. At the same time, the tautology implied in inviolability establishes the irrelevance of the human dignity proposition to reality. Linguistic and doctrinal tools of critical reflection, such as the *Objektformel*, can materialize the possibility of objectification at the level of language and meaning and, thus, effectuate a break with the tautology only to assess whether inviolability is guaranteed in reality.

v. The vertical and the horizontal axes: height, and depth as breadth

[1446] ibid (4.462), (4.463), (4.464)
[1447] ibid (4.46)
[1448] ibid (4.461)
[1449] ibid
[1450] ibid (4.4611)
[1451] ibid (6.22)
[1452] Baer, 'Menschenwürde zwischen Recht, Prinzip und Referenz – Enttabuisierungen' (2005) 571, 573
[1453] Wittgenstein (n 1444) (5.142)

The law of human dignity is the 'the highest principle of the constitutional order.'[1454] Above and beyond celebrating the prominence of human dignity in the German constitutional order, this statement introduces the dimension of height into the legal language game (see *infra*, the phenomenological analysis) and suggests the hierarchical *modus operandi* of the practice of fundamental rights. The law of human dignity is set at the highest point within the constitutional order, as implied by the Court, vis-à-vis 'further constitutional norms'[1455].

> Moreover, since the enactment of the Basic Law the understanding of the content, function and effects of fundamental rights has deepened.[1456]

The notion of depth intimates the progress marked in understanding the practice of fundamental rights since the enactment of the Basic Law. The passive voice framing ['*[…] das Verständnis […] [hat] eine Vertiefung erfahren.'*] conceals whose understanding has deepened. The documentation of the development of 'medical, psychological and sociological insights into the impacts of the enforcement of life imprisonment'[1457] enkindles the figurative association of depth reached through surveyance[1458] of knowledge about the subject matter across disciplines with the breadth of the legal language game. Heraclitus fragment 101, *ἐδιζησάμην ἐμεωυτόν* [I searched myself] alludes to self-reflection as an inquiry into the inner self, which could be parallelized to inner morality as in Kant, and as a mode of understanding that is essentially different from *πολυμαθίη* [polymathy, *Vielwisserei*[1459]] in fragment 40, which refers to the effort to exhaustively survey the content of the field of sight extending before the eye. Granted of sociological, besides hermeneutic and literary, value, the insight presently gained is that the lens of law alone does not suffice for soundly appreciating such a multi-dimensional subject matter, and for grasping its meta-dimension, thus also for exercising authority over meaning.

[1454] BVerfGE 45, 187 (223)
[1455] BVerfGE 45, 187 (223)
[1456] BVerfGE 45, 187 (227)
[1457] BVerfGE 45, 187 (227)
[1458] See Gadamer, *Truth and Method* (1975, 2004) 301 ['A person who has no horizon does not see far enough and hence over-values what is nearest to him.']
[1459] Thurner (2001) 191

vi. Life imprisonment sentencing vis-à-vis death penalty: mediation and equation, fluctuation of the boundaries of the legal language game in negative delineation

Although life imprisonment had 'for ages been at the core of criminal sanctions', it had lost significance in the course of time, since 'the death penalty was the highest criminal penalty.'[1460] The Court ascertained the meaning of life imprisonment – understood here primarily as significance – apropos another, graver criminal penalty. The legal language game demonstrates surveyance of the discursive controversy re the meaning of each penalty. The various viewpoints on the implications of each punishment and the diametrically opposed stances in tracing the evolution of the juxtaposition cause the boundaries of the legal language game to expand. The introduction of death penalty language into the legal language game of the *Life Imprisonment Case* refines the produced meaning in that it initiates a 'vis-à-vis' determination, namely occasions dissensus. The flow of reasoning in legal language games can be figuratively rendered as a fluctuation of boundaries: in certain parts of the analysis the legal language game expands to accommodate language – hence also meaning – then eliminated causing it contract.

> The dispute over the death penalty has rendered 'for life' an alternative, the constitutional permissibility of which has generally not been challenged. The effects and consequences of life imprisonment on the human personality have been examined in depth in older – not insignificant – literature. A popular argument for advocates of the death penalty was that life imprisonment is more cruel and inhuman ('Horror without end' [*Schrecken ohne Ende*]) than the enforcement of the death penalty ('End with horror' [*Ende mit Schrecken*]). Not until the debates on death penalty had subsided, did scientists in the late 1960s begin to concern themselves with the issues of life imprisonment. Since then, the discussion of this maximum penalty has not died down. [1461]

The adjectives 'cruel' and 'inhumane' are central motifs in the portrayal of human dignity violations. They feature recurrently in the practice of the law of human dignity along with 'degrading'[1462] (see *ex negativo* portrayals of human being-ness in the ontological analysis). The two penalties are measured against each other in terms of their cruel and inhumane character. The 'vis-à-vis' approach is mediated by the

[1460] BVerfGE 45, 187 (224)
[1461] BVerfGE 45, 187 (224)
[1462] BVerfGE 45, 187 (228) ['The demand of respect for human dignity means particularly that cruel, inhuman and degrading punishments are prohibited [cited cases omitted].']

notion of humanism. The FCC identified Art. 1 sec. 1 GG and the principle of the rule of law[1463] as the critical vantage point for reviewing the constitutionality of life imprisonment. The law of human dignity fundamentally conveys humanism; practicing that law as the standpoint of equations, in other words as a mediating concept compasses the *telos* of humanism.

The identification and depiction of mediation in the present linguistic-analytical approach sets the stage for the succeeding phenomenological analysis. The introduced model operates essentially as a multilayered hermeneutic and literary device for analysis. The modest goal of the linguistic-analytical approach is to highlight dominant motifs in the legal language games under scrutiny.

vii. Portrayal of the *Menschenbild* of those sentenced to life imprisonment and of the meta-dimension of law

The boundaries of the legal language game expand as the portrayal draws on Hegelian legal philosophy, yet contract again when the constitutional judge challenges the gravity of such foundations for deciding the constitutional compatibility of a punishment that contradicts the meaning of the law of human dignity in the context of life imprisonment sentencing. The meaning of law's meta-dimension in accordance with the law of human dignity surfaces in the rejection of a tautological rendering of the practice of criminal law. Constitutional law sets limits to what can count as a justification of punishment.

> The thought in Hegelian legal philosophy, 'to honor the criminal through the punishment as a [human being with reason]', though an aspect of the essence of punishment, can in no case stand as the foundation and the constitutional justification of punishment that deprives the human being of his dignity and excludes him for life from society. In a secular and liberal society, it cannot be the task of criminal law to exercise compensation and justice for its own sake. This would correspond neither to the current understanding of criminal justice, nor to a morally acceptable advancement of justice.[1464]

In the *Life Imprisonment Case* the 'individual' and the 'community' feature prominently in the portrayal of law's *Menschenbild.* The image of the human being

[1463] BVerfGE 45, 187 (245)
[1464] BVerfGE 45, 187 (194f.)

does not correspond to that of 'an isolated and autocratic individual'[1465]. Rather, the individual is 'related to the community and bound by the community'[1466]. Depriving human beings of their dignity and impairing the unfolding of law's multidimensional *Menschenbild* by incapacitating, to the highest conceivable degree, the social dimension of human being-ness are incompatible with the boundaries and content of a legal language game ubiquitously permeated by the law of human dignity. 'In a secular and liberal society' criminal law cannot 'exercise compensation and justice for its own sake.'[1467] The practice of criminal law cannot be self-referential; criminal law cannot be practiced 'for its own sake', in other words cannot be linguistic-analytically portrayed as a tautological schema. Tautology is rather reserved only for the phrasing and framing of the law of human dignity as noted *supra.*

Self-referential practice, the Court noted, would not reflect 'the current understanding of criminal justice'. In linguistic-analytical terms, self-referential practice impairs the practice of law's meta-dimension, 'something always missing' and renders meaning a-contextual, since 'the current understanding' or historical context is deemed irrelevant, in other words excludes the very possibility of 'something missing' as a *Leerstelle.*[1468] The rejection of the tautological rendering at once implies 'something always missing', a higher order, a viewpoint outside the realm of criminal law, for the sake of which criminal law should be practiced. Constitutional law is the higher law 'said' in the practice of criminal law. Due to the ethics manifested in the language of the law of human dignity and fundamental rights, these aspects of constitutional law are 'shown' – and, by analogy with the ladder metaphor, also 'said' – in the practice of criminal law.

Ultimately, the constitutional guarantee of human dignity is the highest law in that it encapsulates and enables the practice of law's meta-dimension, namely surpasses constitutional law while within its boundaries. Criminal law statutes should serve the 'morally acceptable advancement of justice' [*sittlich anzuerkennenden Gerechtigkeitsforderung*][1469]. The noun 'advancement' conceals who is entrusted with this task. In truth, legal actors, at once institutions and human beings, advance justice

[1465] BVerfGE 45, 187 (227)
[1466] BVerfGE 45, 187 (227)
[1467] BVerfGE 45, 187 (195)
[1468] The setting of 'a secular and liberal society' corresponds to the world, that is, to the field of sight extending before the eye of the legal actor, 'what is there'. In the world the concrete meaning of 'something missing' as a *Leerstelle* can be derived from context.
[1469] BVerfGE 45, 187 (195)

through law by mobilizing certain language. 'Morally acceptable' suggests the influence of ethics, not just law, on the meaning produced for the furtherance of justice.

The law of human dignity, in view of the 'human' component linguistically and semantically comprised in human dignity language, operates on the borderline between 'what is there' and 'something always missing' as law's meta-dimension. The ethical dimension of the law of human dignity is indisputable. Doctrinal insistence on treating the legal concept as an empty – or black – box with respect to the ethics composing its meaning, in other words on refraining from singling out a particular ethical proposition, serves the pluralism of viewpoints from which concrete claims to human dignity spring. This doctrinal stance is attuned to the understanding of ethics in the *Tractatus Logico-Philosophicus* as transcendental. Nothing can be said about ethics; the transcendental can only be 'shown'. In the linguistic-analytical model, ethics is located at the limit of the field of sight, precisely where the metaphysical subject is found. Ethics is 'shown' in the actions – legal language games or speech acts – of metaphysical subjects, in the propositions conveying the meaning produced by legal actors as metaphysical subjects. The legal proposition of the guarantee of human dignity is an example of such action. The introduction of the human dignity legal language game into the Basic Law by the *pouvoir constituant* as good willing[1470] changed the boundaries of the law, probably reflecting also a change of the limits of language post World War II. The meta-dimension of this constitutional guarantee at the disposal of the *pouvoir constitué* enables the constant challenging of the boundaries of the law from within.

c. Phenomenological

The phenomenological analysis conceives of criminal law punishments in light of the distinction between totality and infinity. Identifying the state with the self permits an understanding of constitutional review and separation of powers as a critical-reflection mechanism that influences the meaning of the law of human dignity produced in the *Life Imprisonment Case*. The face-to-face encounter of the state as an evolving self with the other, namely the human being sentenced to life imprisonment, and the totality and infinity traits in the portrayal of this relation are themes that

[1470] Wittgenstein, *Tractatus*, (6.43)

surface when looking at the text of the *Life Imprisonment Case* through the introduced lens.

i. Breaching the totality of criminal law punishments

The conformity of the penal system with the law of human dignity requires that a breach of the rigid totality structure representing the gravest of criminal law punishments, life imprisonment sentencing, be provided for. The breach furthers the humanism of law as understood in light of the phenomenological insights in Chapter One, whilst serving law's pragmatism, that is, allowing for response to *ad hoc* cases. The FCC defined the scope of state responsibility towards the human being sentenced to life imprisonment. Resocialization and the chance to regain freedom at a later point in time form the meaning of prisoners' human dignity. The 'interest in' the rehabiliation of the offender, which flows from Art. 2 sec. 1 GG in conjunction with Art. 1 GG[1471], conveys generosity and hospitality, in that it attends the needs of the other that ensue from the social dimension of human being-ness. Guaranteeing the chance of the one convicted to life imprisonment to 'reenter society after atoning for his crime'[1472] signifies the crack in the totality. The task [*Aufgabe*] of the state is 'to take all measures within the realm of the possible for the achievement of this goal of implementation [*Vollzugsziel*].'[1473]

ii. Constitutional review and the principle of the separation of powers as a self-reflection mechanism, the face-to-face encounter in responsibility as ability to respond

Responsibility, the ability of the self to respond involves the effort to understand the other. The human face, a unique concretization of law's *Menschenbild,* can never be comprehensively understood or portrayed. In the judicial practice of the law of human dignity the identification of traits of human being-ness featuring commonly in certain contexts is necessary for the purposes of certainty, uniformity and coherence of courts' jurisprudence. Subjecting the other to the totality of the self's vision and schematically identifying certain characteristics as manifestations of human being-ness in the context of life imprisonment is an – ontologically significant – transformation of perspective into being, and an essential generalization in view of

[1471] BVerfGE 45, 187 (239)
[1472] BVerfGE 45, 187 (239)
[1473] BVerfGE 45, 187 (239)

the *modus operandi* of law as an institution; totality structures are indispensible to law's practice. Typified features of the human face can be illustrative or even representative of who the other is, yet the law of human dignity demands that their employment in the signification of concrete instances of human being-ness and, consequently, human dignity is at once the expression of a reservation or, conversely, opens up a space for dissensus. Phenomenological portrayals of human being-ness should demonstrate consciousness of the important insight that the field of sight extending from the first-person point of view is a totality and as such only one side of the story; another side is infinity, rendered as emptiness that permits the unique imprint of the human face on law's *Menschenbild.*

Insights into the portrayal of the human being sentenced to life imprisonment ensuing from scientific research are employed as grounds for the association of lengthy imprisonment with personality changes of a damaging nature.[1474] Definite exclusion from society brings about the psychological annihilation of the offender, and is discordant with the duty of the legislature to respect the inherent dignity of all human beings, 'even the common criminal', under Art. 1 sec. 1 GG. Due to the multidimensionality of human being-ness, composing law's *Menschenbild* should be an inter-, multi- or/and transdisciplinary enterprise, certainly, in other words, a methodological enterprise involving reflexivity, and should be performed on an *ad hoc* basis. A responsible answer to the other in view of the law of human dignity requires openness to sources of external justification.

The reasoning of the FCC as regards the latitude of the legislator to limit personal freedom[1475] shows how the latter, as the self entrusted with the production of meaning in accordance with constitutional review and the principle of the separation of powers, should approach the other.

> […] the FCC has the duty to protect fundamental rights against [infringements from] the legislature. The Court is therefore not bound by the legal interpretation of the legislature in its review. Insofar, however, as evaluations and factual assessments of the lawmaker are of importance [to constitutional review], the Court may in principle overrule them only when they are refutable. However, it seems puzzling that even in cases where grave infringements of fundamental rights are under review, ambiguities

[1474] BVerfGE 45, 187 (192)
[1475] Schnapp (1989) 1, 8 [*Grundrechtsbindung der Legislative* and *Verfassungsgerichtsbarkeit*]

> in the evaluation of the facts will come at the expense of the holder of the fundamental right. [1476]

Constitutional review and the separation of powers set in motion a mechanism of self-reflection[1477]. In that process of self-reflection the constitutional judge takes the leading role.[1478] The Court emphasized the interest of the 'holder of the fundamental right'; the focus intimates the particularity of the role of the constitutional judge as a representative of state power in the practice of fundamental rights and conveys concern about the allocation of the burden of attaining and demonstrating the ability to respond to the other. Since dealing with ambiguities in the evaluation of the facts does not fall within the scope of responsibility of the legal subject, such shortcomings should not burden the other.

The constitutional judge triggers off the self-reflection of the state in pronouncing how another actor should practice the law of human dignity; delineates the scope of the latitude of another branch of state power; and guides the respective actors as to how their viewpoint should be shaped.

> The latitude of the legislator is limited in several respects. […] The freedom of the individual is already such an important legal interest [*Rechtsgut*], that it may be limited only on the basis of especially weighty reasons [cited case omitted], and therefore the lifelong deprivation of this freedom demands particularly strict scrutiny by the standard of the principle of proportionality. [1479]

Can the dangerousness and the incorrigibility of the offender as, respectively, a frequent justification and an underlying assumption of life imprisonment sentencing, justify interference with the human dignity of the individual for the protection of society in light of the principle of proportionality?[1480] The tautological proposition

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[1476] BVerfGE 45, 187 (238)
[1477] BVerfGE 45, 187 (238)
[1478] Mutual responsiveness among courts of different instances can also be portrayed as self-reflection within one and the same branch of state power. The FCC referred to a statement of the First Senate of the Federal High Court of Justice with jurisdiction over criminal cases, which was in its turn probably triggered by the question referred to the FCC by the Verden District Court. The statement of the Federal High Court defended life imprisonment on the grounds that it is compatible with the constitution, and in conformity with the general view of the law ['*allgemeiner Rechtsanschauung*'] and existing jurisprudence. While criminological-political questions re the role of criminal law in modern society rest with the legislature, which had decided to that date to retain life imprisonment for the most serious offenses, the FCC understood its own role to be the examination of consistency with the constitution within the scope of submissions to it. The constitutional judge as the critical self and author of the decision evidently considered the inclusion of other courts' position relevant. BVerfGE 45, 187 (223ff.)
[1479] BVerfGE 45, 187 (223)
[1480] BVerfGE 45, 187 (194ff.)

conveying the meaning of human dignity by analogy with the notion of morality in *Totality and Infinity* expresses the inviolability of human dignity. Freedom is not justified by freedom; the only tautology among fundamental rights provisions in the Basic Law is implied in the law of human dignity. Levinas notes that freedom is irrational due to the infinity of its arbitrariness and needs to be tempered by justice. Human dignity is the basis for setting limits to personal freedom in order to protect society; the justification of restrictions to individual freedom evokes hospitality, namely allowing the face of the other – who can also be conceived of as a collectivity – to approach the individual as self from a dimension of height and thus dominate the self. The right to personal freedom can be limited by an act of parliament in accordance with Art. 2 sec. 2 sent. 3 GG.

The inviolability of human dignity in the provision of Art. 1 sec. 1 GG is grounded on the tautological phrasing implied in the human dignity guarantee, namely that respect and protection of human dignity is accorded to human beings by virtue of being human. From a phenomenological perspective, this proposition not only signifies morality, the accomplishing of the I *qua* I as understood in *Totality and Infinity*, but also constitutes as such a manifestation of generosity, namely an articulation of the world by the self and an offering of that world to the other. The inviolability of human dignity is the first factor to be taken into account by the legislature in exercising its authority over meaning. That human dignity is 'the highest principle of the constitutional order'[1481] intimates the notion of height, which appears in the discussion of morality and the association of transcendence with transascendance in *Totality and Infinity*. Morality, according to Levinas, originates in the fact that multifarious manifestations of human vulnerability converge at a 'point in the universe'; the dimension of height enhances the spatial rendering of that critical point.

Further constitutional norms influencing the latitude of the legislator to interfere with the right to personal freedom, even of the 'common criminal', are the equality provision (Art. 2 sec. 1 GG), the requirements of the rule of law and the social state (Art. 20 sec. 1 GG), and the principle of proportionality. The notion of equality as explored in Levinas' phenomenology offers fertile ground for displaying the intersection between the humanism and the pragmatism of law. Equality lies

[1481] BVerfGE 45, 187 (223)

where the other commands the same and reveals him or herself to the same in responsibility; otherwise practicing equality is but reference to an abstract idea and only a word, hence void and merely rhetorical. The meaning of equality cannot be detached from humanism perceived as the welcoming of the face, of which equality is a moment.

In light of the hermeneutic tools presently employed, the rule of law can be rendered as an all-encompassing totality structure. The rule of law corresponds to the assertion about the indispensability of totality structures to the practice of law, particularly fundamental rights. In what sense does the rule of law set limits to the interference of the legislator with personal freedom? The rule of law guarantees that the distillation of law's humanism is maintained within the uniform, foreseeable, certain, coherent totality structure of law. The principle of the social state evokes fraternity and solidarity as in *Totality and Infinity*. Fraternity is instituted in language, precedes and constitutes the ipseity of human beings, guarantees the very possibility of the face-to-face encounter, and encapsulates a relational understanding of human being-ness and consequently of human dignity. Fraternity and solidarity are premised on language, rather than resemblance or a 'common cause of which they would be the effect', which would effectively impose the totality of such causality on the meaning of human being-ness.

The principle of proportionality[1482] by analogy with the logical form 'shown' in propositions in the *Tractatus Logico-Philosophicus* denotes law's meta-dimension and is shown in linguistic-analytical practice within legal language games. In phenomenological terms, limitations to the legislator's authority over meaning in view of the principle of proportionality manifest infinity, the maintenance of an intersubjective space within which infinite weighing and interpretation ensuing from real conversation take place. Practicing the principle of proportionality constitutes *per se* an appeal to the intersubjective space associated with God in Levinas' phenomenology.

While the practice of pardon 'results to a further substantive limitation of the danger of serious changes in the personality [of the prisoner]'[1483], it is not sufficient

[1482] BVerfGE 45, 187 (223) ['The freedom of the individual is already such an important legal interest [*Rechtsgut*], that it may be limited only on the basis of especially weighty reasons [cited case omitted], and therefore the lifelong deprivation of this freedom demands particularly strict scrutiny by the standard of the principle of proportionality.']
[1483] BVerfGE 45, 187 (241)

[*genügt das Institut der Begnadigung allein nicht*] from the vantage point of the law of human dignity to guarantee a chance 'in principle' for those sentenced with life imprisonment to partake in freedom in the future.[1484] This chance must be 'concrete' and 'realizable' not on occasion, but rather in principle[1485]. Only a pragmatic chance to regain freedom amounts to a responsible answer to the other in line with the law of human dignity. The abandonment of all hope of regaining one's freedom is regarded as an interference with the core of human dignity.

The Court acknowledged that life imprisonment 'is the most severe penalty in presently valid law' and argued that it 'should be preserved because it is necessary to protect the common good [*Allgemeinheit*] from serious criminal offences.'[1486] The protection of the common good might require not only the imposition, but also the carrying out of the life imprisonment sentence. The FCC resorted to empirical insights [*Die Erfahrungen hätten jedoch gezeigt […]*][1487] showing that 'from the standpoint of the protection of society [*unter dem Gesichtspunkt des Schutzes der Gesellschaft*]'[1488] carrying out the sentence imposed until the death of the offender is not necessary in a considerable number of cases. Identification of the protection of society as the critical standpoint suggests how the FCC, in practicing the law of human dignity, influences and administers the dynamics of the relation between various, different others it encounters[1489]. In the *Life Imprisonment Case* the other signifies the offender, an individual human being, but also the society as a collective other. Responding responsibly presupposes an appreciation of the relations between human beings.

The FCC noted that a significant number of the perpetrators of the murders in question 'in all probability will not repeat the crime'[1490], and most of these crimes are 'situational actions and actions related to the perpetrators' personalities […].'[1491] On the basis of this portrayal, the Court argued, '[i]n such cases of positive social prognosis the sentence of life imprisonment can hardly be justified criminologically-

[1484] BVerfGE 45, 187 (245)
[1485] BVerfGE 45, 187 (250f.) ['The individual and case-by-case determination of whether the offender merits parole could not however solve the problem satisfactorily. [Leading officials] from the various states had indicated in their resolution of 16th of March 1972 that the law then valid would have to be corrected by a uniform practice of pardon [at the level of the Federal Republic].']
[1486] BVerfGE 45, 187 (250)
[1487] BVerfGE 45, 187 (250)
[1488] BVerfGE 45, 187 (250)
[1489] Binder & Weisberg, *Literary Criticism of Law* (2000) 468 ['The distribution of perspectives in a society and the relationships among them, at one time or over time, may have a distinct shape – at least from the perspective of a particular observer.']
[1490] BVerfGE 45, 187 (250)
[1491] BVerfGE 45, 187 (250)

politically.'[1492] Prior practice affirms this observation, since it had been 'hardly regular' to that date that every offender would remain imprisoned until his or her death. The experience of 'extraordinary psychical and physical distress' resulting from protracted imprisonment can cause 'significant impairment of the personality structure of the prisoner'[1493], therefore could call for 'the introduction of the possibility of an earlier release.'[1494] The impairment of offenders' personality structure can be understood as an interruption of their continuity**.** The intensity of the impairment is contingent on the prospect of returning to freedom. If the prisoner is 'denied *a priori*' this chance, namely if there is no escape from the totality of life imprisonment sentencing, then '[t]he sentence […] cannot be enforced meaningfully'[1495]. Meaningful enforcement of life imprisonment sentencing provides for the possibility of a breach of the totality, that is, for transcending its boundaries.

In the case of offenders who are dangerous to the common good the prospects of rehabilitation are poor. The implementation of the punishment is tailored to the offender as an individual human being[1496]; the practice of law is premised on a relational-phenomenological perception of humanism, the face-to-face encounter with the other. Were the execution of life imprisonment sentencing rather conditional on a fixed determination of the sentence as such, the face of the other would be totalized.

The commitment to a face-to-face encounter with the other as an individual human being is evinced and enhanced in the elaboration on the principle of guilt [*Schuldgrundsatz*][1497].

> According to the principle of guilt [*Schuldgrundsatz*] which derives from Art. 1 sec. 1 and Art. 2 sec. 1 GG (dignity and individual responsibility of the human being) and from the rule of law, facts and legal consequences must – in line with the idea of justice – be properly aligned [cited cases omitted]. Therefore, the threatened punishment must be tailored to the severity of the offense and the degree of culpability [guilt] of the offender; the penalty imposed shall not exceed the guilt of the offender. [1498]

Justice demands correspondence of legal consequences to facts. Interestingly, a responsible answer to the other depends on the fulfillment of the formal requirement

[1492] BVerfGE 45, 187 (251)
[1493] BVerfGE 45, 187 (250)
[1494] BVerfGE 45, 187 (250)
[1495] BVerfGE 45, 187 (250f.)
[1496] See BVerfGE 45, 187 (258) [under (c)]
[1497] Badura (1964) *JZ* 337, 337f.
[1498] BVerfGE 45, 187 (259f.)

of argumentative soundness of the constructed legal syllogism and of the substantive requirement of tailoring the threatened punishment to the severity of the offense and the degree of the guilt of the offender as an individual human being, namely of alignment with the humanism of the face-to-face encounter.

The Court as the speaking self and author of the decision directed the legislator as another manifestation of the self to deliver upon the 'constitutional duty […] to introduce appropriate legislation'[1499], namely to produce meaning[1500]. The requirement that legislation be 'appropriate' translates into the duty of the legislator to respond responsibly to the other. Relying on previous FCC jurisprudence the Court granted 'a reasonable time' to the legislator 'to gain experience [*'die Sammlung von Erfahrungen'*] on account of the evolving complexes to which problems of life sentence and its execution belong.'[1501] A responsible answer to the other presupposes acquiring an informed field of sight. The legislator was given 'reasonable time' to inquire into the subject matter in line with Levinas' definition of responsibility as the ability to respond to the other.

iii. The evolving self

The evolving self absorbs the self as other into the same, thus exercising ipseity. The multidimensionality and ubiquitousness of the self-reflection process are plain to see in the phrasing and framing of the following excerpt.

> […] since the enactment of the Basic Law the understanding of the content, function and effects of fundamental rights has deepened [*hat das Verständnis […] eine Vertiefung erfahren*]. Also, medical, psychological and sociological insights into the impacts of the enforcement of life imprisonment have developed. Especially for the assessment of the constitutional admissibility of the sentence to life imprisonment important factors are to a considerable extent time-relevant.[1502]

Whereas the development of medical, psychological and sociological insights is directly attributable to actors operating within the respective disciplines, passive voice effectively conceals whose understanding has deepened apropos the enactment of the Basic Law. Is the self implied in this excerpt the FCC as part of the evolving

[1499] BVerfGE 45, 187 (252)
[1500] Schnapp (1989) 1, 8
[1501] BVerfGE 45, 187 (252)
[1502] BVerfGE 45, 187 (227)

society and as a mirror of its evolution? The dimension of depth is associated with the dimension of height; both connote movement on a vertical axis.

> The judgment of what corresponds to the dignity of the human being can thus only be based on the present state of knowledge and not on a claim to timeless validity. [1503]

The world subjected to the totalizing vision of the self is absorbed by the self. The self in its *ipseity* confronts the otherness of the world and absorbs it, claims Levinas in *Totality and Infinity*. The constitutional judge expects the legislature to confront the evolution in the world and integrate this experience into the legislation introduced, thereby rendering it 'appropriate'. The evolution of the self is contingent on the evolution of the world and vice versa; the ability to respond to the other is premised on the phenomenological insight of mutual reflexivity. If the legislature 'fails a later review and improvement, despite [having] adequate experience for a more appropriate solution'[1504], then the constitutional judge shall intervene. The responsibility of the FCC involves reviewing the response of the legislator a manifestation of state power is to ensure the responsible response of the legislator. The above excerpt indicates at the same time that, in portraying the human being at the receiving end of a responsible response, the self seeks to unveil the particulars of that being in a specific time and context.

'New insights'[1505], the change in the world, can alter the signification and significance of life imprisonment sentencing. The law of human dignity and the rule of law[1506] are the lenses defining the viewpoint of the self; they mediate the production of meaning. Levinas warns against the kind of mediation that destroys the radical distance between the self and the other. Adopting this lens becomes imperative in view of the indispensability of human dignity.

> In all this, one thing should not escape one's attention [*darf nicht aus den Augen verloren werden*]: the dignity of human beings is something indispensable [*etwas Unverfügbares*].[1507]

The expression used in the original text, *'darf nicht aus den Augen verloren werden'*, evokes directly the concept of vision and offers an opportunity to touch on

[1503] BVerfGE 45, 187 (259)
[1504] BVerfGE 45, 187 (252)
[1505] BVerfGE 45, 187 (227)
[1506] BVerfGE 45, 187 (227)
[1507] BVerfGE 45, 187 (229)

the value of totality stories. Vision enables the surveyance of the world, hence permits the development of an informed viewpoint. Enlarging the field of vision, that is, stretching the boundaries of the legal language game, enriches the context of 'something missing' as a *Leerstelle*; the deduced meaning of the *Leerstelle* is thereby enhanced and more soundly justified. Permitting a crack in the totality of the world – always limited and uniquely perceived by each human being as metaphysical subject – presupposes the institution of a totality structure. Extending the emphatic affirmation of the indispensability of practicing the law of human dignity to the transcendental, understood presently as the breach of totality, results in the presence of language that escapes the grasp of any self, 'something always missing', within law.

The Court's observation that the constitutional admissibility of life imprisonment is 'to a considerable extent time-relevant' reinforces the portrayal of the judge as an evolving self[1508]. The evolving self[1509] – presumably collective, in lack of concrete determination – is directed towards more humane forms of punishment. The Court emphasized, as noted *supra*, the nexus between knowledge of human dignity meaning and historical evolution. Historical evolution shows that the criminal justice system compasses humanism, since 'always-milder punishments have replaced those more cruel in character, and […] progress is directed from more crude towards more humane'[1510]. This knowledge, gained through surveyance and evaluation of changes in that system, led the Court to the conclusion that 'it is clear which path should be followed […]'.[1511]The syntactical choice of passive voice conceals precisely who the self is.

In a later part of the Court's reasoning, the shift from a perception of imprisonment as pure incarceration to considering rehabilitation one of its prime

[1508] Binder & Weisberg, *Literary Criticism of Law* (2000) 132 ['Interpretive dialogue is a matter of fusing the horizons of text and interpreter. Clearly the interpreter's horizon can shift by learning information about the past – but how can the horizon of a past text move or expand? The Gadamerian answer is that the past we interpret consists not of authors, but of artifacts that command our attention only as contributions to a continuing tradition. It is the nature of textual meaning to shift over time, as the concerns that movtivate reading the text change […].']

[1509] See also *Furman v. Georgia* 408 U.S. 238, 270 (Brennan, J., concurring) (1972) ['Ours would indeed be a simple ask were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know "that the words of the [Clause] are not precise, and that their scope is not static." We know, therefore, that the Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." […] That knowledge, of course, is but the beginning of the inquiry.']

[1510] BVerfGE 45, 187 (229)

[1511] BVerfGE 45, 187 (229)

purposes signals change. The FCC, the evolving self, had repeatedly emphasized the association of the 'call for resocialization' with the self-understanding of a community 'that sets human dignity at its center and commits itself to the principle of the social state [*Sozialstaatsprinzip*]'.[1512] The Court perceived of the shift towards a policy of rehabilitation and resocialization as an indication of correspondence between law and life, and as the result of collective self-reflection spurred by human dignity and the principle of the social state.

iv. Tracing totality and infinity: the notion of height, non-mediation, critical reflection as the process for attaining the ability to respond to the other

How can the dimension of height in 'highest legal values' be portrayed applying the introduced model? How is the finitude resulting from subsumption under totality structures connoted in the phrase 'legal values' reconciled with the infinity of the ethical? How, if at all, does the transcendental meaning of human dignity surface in the above excerpt? Who is conceivably at the receiving end of the duty deriving from the constitutional guarantee of human dignity and borne by all forms of state power? Approaching the issues raised by these questions in a spirit of critical reflection can take two different courses. The first would be full-scale skepticism about whether the ethics conveyed in human dignity language can be subject to law as, partly yet dominantly, a totality structure. The humane practice of the law of human dignity should guarantee a crack in the totality. The second course of critical reflection would set off from the premise that the totality portrayal constitutes just one side of the story. The other side of the story is infinity, emptiness. Are both sides of the story traceable in the following excerpt?

> The free human personality and its dignity are the highest legal values within [*innerhalb*] the constitutional order [cited cases omitted]. State power in all its manifested forms [*Erscheinungsformen*] is under a duty [*Die Staatsgewalt ist […] die Verpflichtung auferlegt*] to respect and protect the dignity of the human being.[1513]

The FCC grounded the meaning of the law of human dignity and freedom of personality in a 'conception of the human being as a spiritual-moral being, invested

[1512] BVerfGE 45, 187 (239)
[1513] BVerfGE 45, 187 (227)

with the freedom to determine and unfold [*entfalten*] [him- or herself].'[1514] It zoomed in on the 'human' component of 'human dignity' in producing the meaning of the legal concept. Construing law's *Menschenbild*, the Court appealed directly to the transcendental as an aspect of human being-ness, and to the self-determination of the human being. The 'freedom to […] unfold', the unforced movement analyzed in the ontological account, is enhanced by the phenomenological portrayal. The ontological understanding of this unfolding is premised on the *polemos* required to traverse a limit in coming-into-being; the law of human dignity guarantees that the irruptive event of disclosure is not forced but allowed to happen. The phenomenological account amplifies the portrayal of the movement: it is transcendence of a limit towards infinity. The breach of the totality can be paralleled to the 'happening of the irruption of Being' and the traversal of a limit, though transcendence, as Levinas shows, can only occur in the relation with the other. The dimension of height in the phenomenological portrayal of the unfolding points to the direction of the movement; transcendence is, argues Levinas, transascendance.

Totality qualities are apparent in the above excerpt. Respect and protection of human dignity 'belong to' [*gehören zu*][1515] the constitutional principles of the Basic Law, and the free human personality and its dignity are the highest legal values 'within' the constitutional order. Classification under the total of constitutional principles of the Basic Law and inclusion of the identified values within the totality of the constitutional order denote exposure to the totality of vision. The totality framing of the dimension of height in 'highest legal values' provokes reflection on how height is actually conceived and on where the apex is located apropos the constitutional order.[1516] The highest legal values lie 'within' the totality of the constitutional order; in other words, are in certain respects encompassed and finite. The state, in all its manifested forms, has the duty to practice the law of human dignity, namely to respect and protect the human being.

Reference to values and to the duty imposed on state power indicates the meta-dimension of practicing the law of human dignity. However, since the 'highest legal values' and the legal concept of human dignity are located within the totality of the constitutional order, the story told seems to ignore the transcendence of a limit

[1514] BVerfGE 45, 187 (227)
[1515] BVerfGE 45, 187 (227)
[1516] BVerfGE 45, 187 (227)

towards the infinity beyond it as an indispensible aspect of human dignity meaning. Allusion to the duty of state power to practice human dignity sheds new light on the puzzling portrayal of the inclusion of transcendental ethics and infinity in the totality of the constitutional order.

State power is 'under a duty' [*Die Staatgewalt ist […] die Verpflichtung auferlegt […]*] to respect and protect the dignity of the human being. This – probably benign observation from a mainstream viewpoint – carries enormous weight from a hermeneutic and literary perspective. Since state power is 'under a duty' to practice the law of human dignity, that duty must originate beyond state power; the constitutional order of the Basic Law generates it. This claim could lead one to assert that only a totality story is conceivable, since the constitutional order *per se* is still a totality. What, then, should we make of the fact that the Basic Law encompasses human dignity language? Practicing human dignity language in law, indeed operating as a totality structure, influences at once the content and the form of the constitutional order. Human dignity incarnates the notion of the limit. The portrayal of the meaning of practicing the law of human dignity as a two-sided story, totality and infinity, results from a hermeneutic and literary analysis that demonstrates and develops an affirmative stance towards 'something always missing', the signifier of infinity.

In light of the Preamble to the Basic Law, the duty to respect and protect human dignity is a responsibility towards human beings and God. In delivering upon this duty, the self has authority over the meaning produced[1517]. Understanding the practice of the law of human dignity through the lens of Levinas' pre-ethics substantiates the transcendental meaning of the legal concept on the one hand, and responsibility and generosity on the other. The legal guarantee of human dignity comprises an appeal to human being-ness, hospitality, fraternity, and solidarity instituted in language and real conversation, rather than vision and subjection to vision. This perception of human dignity meaning rules out the totalizing thematization of the other approached through mediating concepts that effectively destroy the absolute separation from the self.

Non-mediation or mediation that does not destroy the distance between the self and the other are evidenced in the tautological phrasing of the guarantee to respect and protect human beings *qua* beings. Moreover, themes permeating the

[1517] The democratic pedigree of that authority is a factor of legitimacy that influences the *modus operandi* of constitutional review and the separation of powers practiced as self-reflection mechanisms.

phenomenological portrayal, language as the foundation of the face-to-face encounter, goodness as hospitality and generosity, desire for the Other traced in the face of the other, and understanding God as the intersubjective space resulting from real conversation all bespeak immediacy and maintenance of the absolute separation. The law of human dignity guarantees that the self's authority over meaning is exercised in critical reflection. Critical reflection is, then, the process for attaining the ability to respond to the other, responsibility.[1518] In responding to the other the law of human dignity is a mediating concept used as a Wittgensteinian ladder.[1519]

Nothing in the language employed in the above excerpt forecloses telling another parallel story of 'something missing'; on the contrary, the shift of perspective enables zooming in on language alluding to law's meta-dimension. The phrase 'highest legal values' suggests the totality structure within which values are visible and graspable, without detracting from their transcendental, ethical dimension. Likewise the totality of the 'constitutional order' confines human dignity within its horizons, yet, at the same time, embraces the language that can effectuate a breach of its boundaries, the possibility of a crack in the instituted totality. The doctrinal distinction between human dignity and the law of human dignity (see *infra*, the phenomenological analysis of the *Aviation Security Act Case*) is illustrative of the coexistence of the totality and infinity in FCC jurisprudence.

v. Self-determination and the face-to-face encounter: freedom, fraternity, autonomy and absolute separation, morality

The FCC added that the Basic Law understands human freedom 'not as that of an isolated and autocratic individual, but rather as that of an individual related to the community and bound by the community [cited case omitted].'[1520] The passage evokes the notions of freedom and fraternity as in *Totality and Infinity*. Freedom is arbitrary, thus needs to be tempered by justice, and irrational due to the infinity of its arbitrariness.

> On account of being community-bound, the freedom of the individual cannot be 'in principle unlimited' [*prinzipiell unbegrenzt*]. The individual must allow those limitations of his freedom of action that the legislator deems generally reasonable for

[1518] In the practice of law, compliance with this process should be demonstrated. Legal doctrine serves the economy of the required demonstration in that respect.
[1519] Wittgenstein, *Tractatus* (6.54) [the ladder metaphor]
[1520] BVerfGE 45, 187 (227)

> the maintenance and promotion of social life within the limits of the given subject matter […].[1521]

Freedom is not justified by freedom, but rather needs to be subordinated to the hospitality of the self who welcomes the other and allows the face of the other to approach and dominate the self from a dimension of height. In *Totality and Infinity*, the human I is posited in fraternity, which is not added as a moral conquest to individual human beings, but precedes them and constitutes their ipseity. From a phenomenological perspective, the position of the I is effectuated already in fraternity and on those grounds is the face-to-face encounter, the relational account of the meaning of practicing the law of human dignity, possible. Human beings in fraternity are self-referential individualities. God then signifies that human kinship is founded on the Other in the face of the other and connotes height.

> […] the autonomy of the person must be preserved (BVerfGE 30, 1 (20); *Wiretapping Case*, *Abhörurteil*]). This means that also in the community each individual must be recognized principally as a member with equal rights and value of [his or her] own. It therefore goes against human dignity to render human beings mere objects of/in the state [*'im Staate'*] [cited case omitted]. The proposition, 'the human being must always remain an end in itself', is fully applicable in all areas of law; for the inalienable dignity of human beings as persons consists exactly in the self-evident preservation of the recognition of [human beings as] personalities who bear responsibility for themselves. [1522]

The autonomy of the person, of which the absolute separation between the self and the other is a relational depiction, must be preserved. The FCC understood this statement as denoting the equal rights and unique value [*Eigenwert*] of individuals as members of the community. According to Levinas, equality 'is produced where the other commands the same and reveals himself to the same in responsibility […]'[1523]. Equality is thus contingent on the welcoming of the face 'of which it is a moment'[1524] and, unless practiced 'in responsibility'[1525], tantamount to 'an abstract idea and a word'[1526]. The unique value of individuals, the 'value of their own', evokes morality, the accomplishing of the I qua I, as in *Totality and Infinity*. Morality is distinguished from the notion of equality; equality is not the origin of morality. Morality ensues

[1521] BVerfGE 45, 187 (227f.)
[1522] BVerfGE 45, 187 (228)
[1523] Levinas, *Totality and Infinity*, 214
[1524] ibid
[1525] ibid
[1526] ibid

from 'the fact that infinite exigencies, that of serving the poor, the stranger, the widow, the orphan, converge at one point in the universe […]'[1527]. The coexistence of the self and others is premised on this perception of morality.

The law of human dignity rules out rendering human beings 'mere objects of/in the state'.[1528] In the phenomenological portrayal, state power in all its manifested forms corresponds to the self. The institutional facet of the FCC as self is subject to the totality of the law[1529], while the human factor, metaphysical subjects representing institutions, escapes the subsumption. The inviolability of human dignity stated in Art. 1 sec. 1 GG means that the very possibility of objectification is foreclosed; the other can always 'absolve' him or herself from the relation with the self. Consistent with an institutional perception of law free from imponderabilities associated with the human factor – what is more, the egoism and pleasure of the self – it would be impossible for the *pouvoir constitué* looking through the lens of the Basic Law[1530] to render the other a 'mere object' of state action. What is, then, the significance of objectification language in the Court's legal language game? Why does the meaning articulated and shared by the Court as self comprise objectification language, when the critical lens for looking at the world, the law of human dignity as in Art. 1 sec. 1 GG, excludes the possibility of such language?

The breach of totality is effectuated through language, 'where there is always room for the diversity of dialogue, and for further growth through the dynamics of question and answer'[1531]. Objectification language in the self's legal language game demonstrates awareness of the dangers that inhere in entrusting human beings representing institutions with authority over meaning, while the third-party effect indicates the possibility of objectification of human beings by other human beings. The *Objektformel* doctrine enhances critical reflection and self-reflection. Critical reflection is the process most apt to ensure a responsible answer to the other. Assuming that the human being can become a 'mere object' of state action opens up a field of dissensus. A further conceivable understanding of objectification of human

[1527] ibid 245
[1528] Badura (1964) JZ 337, 339 ['Handlungen, die den Menschen nicht als Selbstzweck, sondern als Mittel zu einem ihm äußerlichen Zweck, als Objekt staatlicher Tätigkeit, benutzen, verletzen Art. 1 I GG.']; See also Dürig (1956) 81 *AöR* 117, 127
[1529] From a legal sociological perspective, I grant, the distinction between the institutional facet and the human factor is not always clearly traceable. Yet, for present purposes, associating institutional features with law as a totality structure serves the hermeneutic and literary analysis.
[1530] Schnapp (1989) 1, 1
[1531] Levinas (n 1523) 16

beings reverses the equation: institutions can totalize the human being[1532]. The neutrality and foreseeability associated with the practice of law can impair the radical distance between the self and the other.

The proposition 'the human being must always remain an end in itself' originates in the thought of Kant. The FCC noted that it is 'fully applicable in all areas of law'[1533]. Self-determination brings about self-responsibility. The other is absolutely other, that is, can always absolve him or herself from the relation with the self. The offender, the concrete substantiation of law's *Menschenbild* in the *Life Imprisonment Case*, 'must not be made the mere object of crime prevention to the detriment of his constitutionally protected right to social worth and respect.'[1534] The forceful deprivation [*entkleiden*] of freedom without a chance to potentially reenter the society of free citizens 'would be inconsistent with this understanding of human dignity.'[1535]

The hermeneutic process evident in the Court's syllogism serendipitously affirms the methodological premises of this analysis; the meaning of the law of human dignity is deduced from the portrayed understanding of the 'human' component. In the context of life imprisonment as means to crime prevention, the offender as a human being 'must not be made the mere object' of state action in view of the 'constitutionally protected right to social worth and respect [*des sozialen Wertanspruchs und Achtungsanspruchs*]' [1536] and must be guaranteed both individual and social existence.

In interpreting the law of human dignity as the guarantee of preserving a chance for prisoners to partake again in the society of free citizens, the Court as self responded to the other. The hope of freedom prohibits the interruption of the continuity of prisoners' human being-ness. Preserving a chance for prisoners to partake in freedom as members of society amounts to a responsible response in the spirit of morality as defined in the work of Levinas; maintaining the hope of freedom prohibits the interruption of their continuity as human beings, 'making them betray […] their own substance'[1537]. The Court demonstrated throughout its reasoning the

[1532] See on institutional humiliation, Margalit, *The Decent Society* (1996) 1
[1533] BVerfGE 45, 187 (228)
[1534] BVerfGE 45, 187 (228)
[1535] BVerfGE 45, 187 (229)
[1536] BVerfGE 45, 187 (228)
[1537] Levinas (n 1523) 21

ability to respond to the other, the human being sentenced to life imprisonment, for whom it required a 'meaningful treatment' [1538] in line with human dignity.

Prisons as a manifested form of state power are under the duty 'to strive towards the resocialization of prisoners sentenced to life imprisonment, to maintain their ability to cope with life and to counteract the harmful effects of deprivation of liberty and also, and most importantly, the thereby caused changes in personality.'[1539] In line with the relational account of the law of human dignity, that is, responsibility towards the other, and the insight that violence occurs not only in 'injuring and annihilating'[1540] human beings, but rather, predominantly, 'in interrupting their continuity, making them play roles in which they no longer recognize themselves, making them betray not only commitments but their own substance, making them carry out actions that will destroy every possibility of action […]'[1541], resocialization constitutes a concrete manifestation of practice of the law of human dignity, namely the duty of the state to protect the human dignity of prisoners.

vi. The interplay between totality and infinity: absolute threat of punishment or '*Strafrahmen*'?

From a phenomenological perspective, the most compelling question in the *Life Imprisonment Case* is 'whether it is compatible with the principle of proportionality to accord every case of murder of wanton cruelty or murder to conceal another crime solely life sentence'[1542]. This concerns ultimately the decision between the regular 'frame of penalty within which the adjudicating court has to determine the appropriate penalty in a concrete individual case'[1543] opened by the legislature and the mandatory sentence of life imprisonment with absolute threat of punishment. The referring court had also called for discretion [*Strafrahmen*] re the adjustment of the penalty 'to the demeritorious content of the offense and to the culpability of the offender, so as not to be forced to impose what seems an inappropriately high sentence […]'[1544]. The two possibilities construe different portrayals of the practice of the law of human dignity.

[1538] BVerfGE 45, 187 (238)
[1539] BVerfGE 45, 187 (238)
[1540] Levinas (n 1523) 21
[1541] ibid
[1542] BVerfGE 45, 187 (260)
[1543] BVerfGE 45, 187 (260)
[1544] BVerfGE 45, 187 (260)

Opening a frame of penalty means leaving room for mobilizing the principle of proportionality. Practicing the law of human dignity in accordance with that principle strongly evokes in phenomenological terms the task of infinitizers, and connotes the opening of an intersubjective space. Since the encounter of human beings in the intersubjective space operates as a process of reflection, weighing and deliberating on the appropriate punishment within a frame is not only presupposed by, but also leads to perpetual alteration and enrichment of that space. Levinas hints at the existence, 'perhaps', of God in the intersubjective space[1545]. Understanding the principle of proportionality by analogy with the concept of intersubjective space intimates its meta-dimension. Instituting the absolute threat of punishment is the second conceivable mode of practicing the law of human dignity in the context of life imprisonment sentencing. As the Court noted, the absolute threat of punishment 'is a contribution to legal certainty and uniform punishment of offenders.'[1546] The language employed directly calls forth traits of totality structures. How does the FCC deal with the issue before it?

Claiming an empirical basis for its assertions[1547], the FCC effectively portrayed an intersubjective space, observing how 'penalties differ, indeed not insignificantly, from court to court even when the circumstances are similar.'[1548] Even when the facts presented to different courts are similar, argued the Court, the production of meaning by courts results in disparate corresponding legal consequences. The existence of an intersubjective space is additionally attributed to differences between the judge and the legislator as selves. The former, being 'generally milder', is 'sometimes prone to avoid the most severe punishment as much as possible', while the latter would opt for their application[1549]. Another factor influencing the tangibility of this difference between the judge and legislator is the gravity of the statutory penalty or the degree of its intensity as an interference with the offender's fundamental rights[1550]. The Court presented both advantages and shortcomings of the totality pattern of the absolute threat of punishment.

[1545] Levinas, *Totality and* Infinity, 290
[1546] BVerfGE 45, 187 (260)
[1547] BVerfGE 45, 187 (260f.) ['Experience shows […]']
[1548] BVerfGE 45, 187 (260f.)
[1549] BVerfGE 45, 187 (261)
[1550] BVerfGE 45, 187 (261)

> Especially in the case of a crime as serious as murder, the imperative of substantive justice is a justified request working towards an as uniform as possible criminal law practice. Of course it must be acknowledged that the use of a rigid threat of punishment can lead to unsatisfactory results even because of the therein-lying schematism in the specific case. [1551]

Positive and negative reasons why totality structures are – and should be – one side of the story of practicing the law of human dignity can be traced in the above excerpt. In applying criminal law, legal actors interfere with the law of human dignity and fundamental rights; the possibility of arbitrary exercise of their freedom to produce meaning 'especially in the case of a crime as serious as murder' needs to be tempered by justice. On the one hand, uniformity serves the imperative of substantive justice. On the other, the rigidity of the absolute threat of punishment can bring about or intensify the 'therein-lying schematism in the specific case'. Schematism can be rendered as subsumption under totality framings, yet should be perceived as just one side of the practice of law in view of the explicit commitment to humanism in the order of the Basic Law. Totality patterns constitute an indispensible aspect of practicing the law of human dignity.

> The absolute threat of such severe punishment can only be constitutionally acceptable, if the possibility of openness in performing the subsumption of concrete cases under abstract norms to assert the punishment that is consistent with the constitutional principle of proportionality is preserved from the part of the judge.[1552]

For 'the absolute threat of such severe punishment' to be constitutionally acceptable, the possibility should be left open for the constitutional judge to examine whether and how the facts of concrete cases are subsumed under abstract norms. That the punishment should be consistent with the constitutional principle of proportionality constitutes, in phenomenological terms, an affirmation of the indispensability of a processual understanding of the law of human dignity as language opening up an intersubjective space of dissensus and weighings, as a totality structure containing concepts that convey the transcendental, namely the very meaning that can compromise it.

4. Concluding observations

[1551] BVerfGE 45, 187 (261)
[1552] BVerfGE 45, 187 (261)

This hermeneutic and literary analysis of the Life Imprisonment Case traces and unveils the human factor within the legal language game as a figurative rendering of just an aspect of practice. What guarantees the humane imposition of the sentence of life imprisonment? Guaranteeing the possibility of the traversal of limits to the human being sentenced for life, the ontological portrayal indicates; practicing critical reflection and self-reflection, in other words processes premised on an affirmative stance towards the dual sense of 'something missing', understanding the tautological proposition of the law of human dignity as the guarantee, at the propositional level, of inviolability, as the linguistic-analytical portrayal demonstrates; and securing the hope of breaching and escaping totalities towards infinity physically, when released, or psychically and spiritually, that is, while imprisoned, to the human being on account of the constitutional guarantee, a totality structure per se, of human dignity, as the phenomenological portrayal furthers.

III. The *Transsexual I Case* (1978)[1553]

The signification and significance of 'something missing' within the realm of law, despite substantiation of the transsexual human image within the realm of life, is considerably clarified in the analysis of the *Transsexual I Case*. The case under scrutiny is illustrative of the sense in which 'something missing', from a hermeneutic and literary perspective, can be treated as a *Leerstelle*, that is, in line with Wolfgang Iser's conception, an empty position the meaning of which should be sought in the language that surrounds it, or context. Linguistic-analytical and phenomenological portrayals emphasize the implications of inconsistency between law and life for the boundaries of the legal language game and the responsibility borne by the judge as the self with authority over the production of meaning to respond to the other and to engage in a conversation with the other.

1. Decision

The complainant in the *Transsexual I Case* was assigned on the basis of her external sexual characteristics at the time of birth to the male sex, but later felt she belongs in all respects to the female sex and – after changes to her appearance

[1553] BVerfGE 49, 286 (1978), First Senate of the FCC

[*äußeren Erscheinungsbildes*] – lived the life of a woman, while continuing to be legally treated as a man (male transsexuals). The complainant had changed 'his' sex from male to female through sex-change operation. A local civil court in Berlin permitted that 'he' would change his civil status to that of a woman. The complainant was accordingly registered in the birth registry as a woman. The Berlin District Court reversed the local civil court's decision. The Federal High Court of Justice affirmed the District Court's decision, and the civil status of the complainant changed once again to that of a man. The complainant then appealed to the FCC, bringing forth the claim that her human dignity and personality rights were violated. With her constitutional complaint, she turned against the rejection of the change of sex from 'male' to 'female' in the entry to the birth registry.

The FCC found that 'the contested decision violates the complainant's fundamental right under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG.' The complainant was, as medical opinions before the Court affirmed, physically a woman, in accordance with the perceived [*gefühlten,* felt] gender, yet was treated as a man in legal life [*Rechtsleben*]. Not being able to legally bear a female first name manifested the lack of identity between physical, exterior appearance and personal legal status. The conflict experienced by the complainant was interpreted as strife within the most intimate area of personality. Scientific research to that date showed the failure of attempts to dissuade transsexuals from their psychosexual basic structure, and prescribed adaptation to the experienced gender identity through psychotherapy and hormone therapy as the only meaningful means for averting self-harm and suicide incidents. Relying on the opinions of medical experts, the Court maintained that the new gender role is fully recognized only when the name and the personal status of transsexuals change to correspond to his or her gender identity. State intervention in that sphere is only justified in case of special public interest. The Court reversed and remanded the case to the Federal High Court of Justice.

Definitions employed in the decision, as well as insights into the origin and causes of transsexualism were rooted in the state of knowledge at that point in time. The Court availed itself of scientific research to juxtapose the case of transsexuals to that of hermaphrodites, homosexuals, fetishists, or persons with psychosexual anomalies and perversions. That is to say, in the *Transsexual I Case* the meaning of transsexualism is predominantly negatively determined. The Court additionally drew on scientific studies that documented the variety of physical intersexuality to reinforce

its understanding of transsexualism. Admitting certain remaining doubts with regards to the origin and the cause of transsexualism, the FCC turned to the facts of the case before it: the complainant was irreversibly a transsexual and had undergone a sex-change operation.

In the *Transsexual I Case* the interpretation of Art. 1 sec. 1 GG by the FCC focused on the individuality of the human being and the protection of self-determination first and foremost as the development of self-consciousness. Self-responsibility is associated in the Court's decision with being autarkic and controlling one's own destiny. Human dignity in conjunction with the fundamental right to the free development of personality dictate the coordination of the gender identity experienced psychically and physically by the transsexual with her legal status.

Mindful of moral limitations on the fundamental right to the free development of personality, the Court moved on to state that transsexualism effectuated no infringement on the moral law. The FCC pointed out that transsexuals do not intend to manipulate their sex. Transsexualism, in the Court's view, is related to personal self-understanding, not sexuality. According to expert opinions the motivation underlying transsexualism stems from the desire to reinstate the unity of psyche and body. The integrity of human beings is a core element of the constitutional guarantee of human dignity. The FCC went on to tackle, first, the irrationality of the association of marriage with reproduction and, second, contentions regarding the immorality of marriage post sex-change operations. Once again, the Court put forward a line of argumentation that laid stress on the moral evaluation of transsexuals' motivation in desiring to marry heterosexual partners.

The FCC maintained that the refusal to correct the record on the sex-classification of transsexuals in the birth registry violated fundamental rights standards. Despite the absence of a statutory provision on the matter, the Court, reacting to the position of the Federal High Court of Justice re the lack of authority of the judicial power to address such gaps in law, decided that the issues under scrutiny could be confronted by direct resort to constitutional law, particularly the fundamental right ensuing from Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG; therefore, there were in actuality no gaps in the specific area of legal regulation. Although deferring to the legislator for the regulation of persons' civil status would indeed serve best the interest of legal certainty, the FCC defended the constitutionality of its interference in light of Art. 1 sec. 3 GG. The Court remanded the case to the Federal

High Court of Justice, and decided that the definition of the point in time when the legal validity of sex-change could take effect fell within the latitude of that court.

2. Discussion

Self-determination in structuring one's life and protection of the sphere of one's personality in view of the guarantee of human dignity and the general right to personality[1554] are central constitutional interests. The proximity of the general right to personality [*allgemeine Persönlichkeitsrecht*] to Art. 1 sec. 1 GG is established in legal scholarship[1555] and FCC jurisprudence,[1556] where propositions in Art. 1 sec. 1 GG combined with those in Art. 2 sec. 1 GG[1557] form an independent fundamental right. Unlike the absolute guarantee of human dignity under Art. 1 sec. 1 GG, the general right to personality can be restricted by means of statutory law[1558] in line with the application of the system of restraints on liberty rights [*Schrankensystematik*], despite originating also in the human dignity guarantee.[1559] The claim to autonomy rooted in the demand for respect [*Achtungsgebot*] for human dignity has regularly priority.[1560] In legal scholarship concern is expressed as regards the danger of relativization of the guarantee of human dignity through the practice of the general right to personality.

The protection of sexual autonomy under Art. 1 sec. 1 GG entails, according to Herdegen, independently from Art. 2 sec. 1 GG, the right of transsexual persons to

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[1554] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 84; See how the general right to personality, which is founded on the law of human dignity, is also understood as a concept that is destined to attend to instances of 'something missing' [here, '*Lücke'*], Dieter Grimm, 'Persönlichkeitsschutz im Verfassungsrecht' in *Karlsruher Forum 1996 – Mit Vorträgen von Dieter Grimm und Peter Schwerdtner* (Karlsruhe: Vel. Versicherungswirtschaft, 1997) 3, 3 [the existence of a general right to personality does not foreclose the protection of personality through other fundamental rights]; ibid ['[…] Komplementarität zwischen dem allgemeinen Persönlichkeitsrecht und den übrigen Grundrechten […] die als "allgemeines" Persönlichkeitsrecht bezeichnete Rechtsposition keine Schöpfung des Grundgesetzes, sondern ein richterrechtlich entwickeltes Institut ist, das gerade jene Lücke schließen sollte, die sich aus der speziellen Schutzfunktion und der historischen Bedingheit der Einzelgrundrechte ergeben.']; ibid 4 [openness and dynamism of the general right to personality make it difficult to grasp doctrinally]

[1555] Kunig, Art. 1, *GG Kommentar* (2012) para 10

[1556] See BVerfGE 27, 344 (1970) [*Divorce Act Case*, Ehescheidungsakten]

[1557]Art. 2 sec. 1 GG reads: 'Everyone has the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or morality.'; See Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857, 862 ['Die dogmatische Konstrucktion als *Kombinationsrecht* […] jedenfalls wirft mehr Fragen auf als sie Lösungen auch nur anzudeuten vermag.']

[1558] BVerfGE 99, 185 (195) (1998) [*Scientology Case*]

[1559] Kunig (n 1555) para 36; ibid para. 35ff.; See Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857, 862

[1560] Kunig, ibid para 34

opt for a particular gender. It moreover requires respect for this option on the part of the state, reflected especially in the law on personal status.[1561] That the Court in the *Transsexuals I Case* regards Art. 1 sec. 1 GG and Art. 2 sec. 1 GG independently constitutes a deviation from the interplay between the two provisions in FCC jurisprudence.[1562] On account of its openness to varying contexts of practice and to ongoing evolution, the general right to personality can be viewed as a bundle of fundamental rights [*Grundrechtsbündel*].[1563]

The concept of personality in the constitutional law connotes the 'general freedom of action' [*allgemeine Handlungsfreiheit*].[1564] This fundamental right operates as a general clause that fills in gaps, namely the – figuratively rendered – space that special liberty rights leave open.[1565] Its protective scope can stretch so as to include actions that would not fall under the guarantee of personality in the colloquial use of the term.[1566] Art. 1 sec. 1 GG sets limits to extensive restrictions on the general right to personality; it emphasizes the pressing need for the protection of personality as an indispensible manifestation of individuals' human dignity.[1567]

In relevant jurisprudence of the Supreme Court of the United States sexual orientation has been associated with equal protection, as in *Romer v. Evans*[1568], and privacy constitutional concerns. A seminal instance in the jurisprudence of the Supreme Court of the United States is *Lawrence v. Texas*[1569]. The Court held that the Texas statutory ban on sodomy violated the Due Process Clause of the Fourteenth Amendment.

> […] adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.

[1561] Herdegen (n 1554) para 87
[1562] BVerfGE 49, 286 (297); BVerfGE 60, 123 (124) (1982) [*Young Transsexuals Case, Junge Transsexuelle;* no rigid age limits for the change of personal status]; BVerfGE 115, 1 (14) (2005) [*Transsexuelle III*]; BVerfGE 121, 175 (2008) [*Transsexuelle V;* The duty of state is not sufficiently observed, when the recognition of the chosen gender of the transsexual through the law on personal status is conditional on the prior divorce of an existing marriage.]
[1563] Kunig (n 1555) para 10
[1564] ibid
[1565] ibid
[1566] ibid
[1567] ibid
[1568] *Romer v. Evans* 517 U.S. 620 (1996)
[1569] *Lawrence v. Texas* 539 U.S. 558 (2003)

Turning to *Planned Parenthood of Southeastern Pennsylvania v. Casey*[1570], where the Supreme Court stated that 'these matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment […]', and added – indeed loading the argument with ontological meaning – that 'at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of life'[1571], the Court challenged *Bowers v. Hardwick*[1572], reversed and remanded. In her concurring opinion in *Casey* Justice O'Connor did not overrule *Bowers*, yet attacked the statute on narrower equal protection grounds along the lines of *Romer*. Interestingly, the Supreme Court explicitly sought comparative relevance and referred to ECtHR jurisprudence, *Dudgeon v. United Kingdom*.[1573] In this case, laws forbidding homosexual conduct were invalidated. The Supreme Court made a remark of cultural, besides legal, importance: since the decision of the ECtHR was authoritative in all member states of the Council of Europe '(21 nations then, 45 nations now)', *Dudgeon v. United Kingdom* 'is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization'.

3. Analysis

[1570] *Planned Parenthood of Southeastern Pennsylvania v. Casey* 505 U.S. 833 (1992)
[1571] *Casey* 833 (851) (1992)
[1572] *Bowers v. Hardwick* 478 U.S. 186 (1986); In *Bowers v. Hardwick* sexual orientation is framed as a privacy constitutional question. At issue was the application of a Georgia sodomy statute (which applied to all acts of sodomy) to consensual homosexual sodomy. Justice Blackmun stressed in his dissent the 'right to be left alone' and the interpretations of the right to privacy by the Supreme Court as decisional autonomy apropos sexual intimacy and spheres free from interference. Justice Stevens, dissenting, noted that prior cases established that sodomy could not be prohibited within the marital bedroom or between unmarried heterosexual adults and that, since the representatives had voted for a neutral law, the state could not save the statute by announcing that it would only enforce that law against homosexuals withou reason.
[1573] *Dudgeon v. United Kingdom*, no. 7525/76, § 45, ECHR 1981; Catherine Dupré, 'Unlocking human dignity: towards a theory for the 21st century' (2009) *European Human Rights Law Review* 190, 196 ['By acknowledging the importance of 'psychological make-up', the European Court of Justice extended the anti-discrimination clause to protect transsexuals, who were originally not included by the contested piece of European law. Through the reliance on dignity and the extended interpretation of the prohibition of discrimination, the European Court of Justice recognized more fully the transsexuals' identity and their aspirations to happiness, understood here as the right to be considered by the law as being equally worthy of the widower's pension entitlement. These rulings provide an indication of the impact of human dignity on the mainstream human rights approach (here prohibition of discrimination) and on how it can open up legal analysis to a broader range of human dimensions.']; See also *P v S and Cornwall CC* (C-13/94) [1996] E.C.R.; I-2143 ECJ; *KB v NHS Pensions Agency* (C-117/01) [2004] E.C.R. I-541 ECJ, at [7]; *B v France* (1992) 16 E.H.R.R. 1 ECtHR.

In the analysis that follows, the ontological, linguistic-analytical and phenomenological portrayals of the *Transsexual I Case* show how 'something missing' can be filled with meaning by looking at the context of the *Leerstelle*, how this enterprise affects the boundaries of the legal language game and how 'something always missing' and the transcendental are practiced in the text of the *Transsexual I Case* where a face-to-face encounter, the moral law and the coexistence with others in fraternity are traced.

a. Ontological

This analysis points at language of ontological significance in the text of the *Transsexuals I Case*. Minding that telling five stories story of 'something missing' in Chapter Two also serves the purpose of demonstrating how the introduced philosophically grounded hermeneutic and literary lens is to be applied, it should be noted that the ontological analysis of the *Transsexuals I Case* is a most apt performance of how this new lens permits the identification and *ad hoc* filling of 'something missing' with meaning.

i. Identifying 'something missing' and inconsistency between life and law

In line with Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG in irreversible, according to medical findings, cases of transsexualism, and following a sex-change operation, it is 'in any event correct' to register the male sex of a transsexual in the birth registry. A closer look at the language employed in defining transsexualism intimates the tension between life and law. The coming forth in the *polemos*[1574] in life preceded harmonizing their *Physis* and *Psyche* to disclose their essence in law. Life is not mirrored in law, if someone who effectively lives 'the life of a woman' is treated as a man.

> The complainant is one of the persons that have been assigned on the basis of their external sexual characteristics at the time of birth to the male sex, but later felt they belong in all respects to the female sex and today – after changes to their appearance [*äußeren Erscheinungsbildes*] – live the life of a woman, while continuing to be legally treated as men (male transsexuals).[1575]

[1574] Heidegger, *Introduction to Metaphysics*, 149 [Heraclitus, fragment 53]
[1575] BVerfGE 49, 286 (286)

Unlike sociological or doctrinal studies of transsexualism, which could, for instance, inquire into and reflect on the empirical validity of the male-female distinction and classification to start with[1576] or question the *ratio* of registration of the sex at the time of birth, this hermeneutic and literary approach has the more modest goal of highlighting and portraying that the language practiced within the realm of law functions as a cloak of force.[1577] In the *Transsexual I Case,* law resists the recognition of the new gender identity; but precisely such recognition, rather than *ad hoc* treatment, shall permit the occupation of the space that corresponds to 'something missing' with new meaning, that is, the meaning of the part that has no part.

In a heavily gendered world, the explicitly defined ontological signification of concrete instantiations of law's *Menschenbild* can also denote, implicitly, a particular ontological significance or value.[1578] The following remarks by MacKinnon offer an explanation why this is so in the case of women.

> Nice neutral world, difference […]. Nevermind that differences can simply be fragmented universals. It doesn't improve one's ability to analyze hierarchy as socially constructed to add more pieces called differences if the differences are seen as biologically determined to begin with. You have […] a biological theory of gender, and you've gotten equally nowhere in terms of dismantling social hierarchy. Put another way, if women don't exist, because there are only particular women, maybe Black people don't exist either, because they are divided by sex. Probably lesbians can't exist either, because they are divided by race and class; if women don't exist, woman-identified women surely don't exist, except in their heads. We are reduced to individuals[1579], which, of all coincidences, is where liberalism places us. With its affirmation of women's commonalities in all their diversity, it is feminism that rejects the view that 'woman' is a presocial, that is, biologically determined, category and the notion that all women are the same.[1580]

[1576] BVerfGE 49, 286 (298) ['The principle that derives from our legal order and social life is that every human being is of either "male" or "female" sex, regardless of possible anomalies in the genital area.']

[1577] MacKinnon, *Toward a FTS* (1989) 237

[1578] BVerfGE 49, 286 (299); The gendered perspective can be '[…] in the case of the transsexual complainant the feeling that he is a man is missing according to the medical opinions submitted to the court, along with every externally apparent indication of male sex. In addition, his social behavior matches that of a woman. This is supported also by his professional activity as a nurse [*Krankenschwester*].'

[1579] Being 'reduced to individuals' in MacKinnon's argument, is not, I argue, in contradiction of encountering the concrete face of the other in the thought of Levinas; it can be rather viewed as an affirmation of Levinas' proposition that the absolutely other is related to others, on the basis of language, in fraternity and solidarity that does not interfere with their radical separation.

[1580] MacKinnon, *Are Women Human?* (2006) 53

This excerpt, besides criticizing biologically determined identifications[1581]similar to the approach taken here, affords this analysis a snapshot of the implications of identifying human beings with different particulars or, as MacKinnon notes, 'fragmented universals'. MacKinnon's bold rhetorical style contributes to alarming us to appreciate what is really *enjeu* in choosing specific language, that is, particular identifications, in filling 'something missing' with concrete meaning.

The ontological account of the law of human dignity emphasizes the guarantee of the self-determined disclosure of the human being and the claim vis-à-vis the state and third parties to refrain from forcefully interfering in this irruptive process.[1582] 'Something missing' as an integral feature of human being-ness and, on the basis of linguistic and semantic overlapping, of the law of human dignity is the part of those who have no part[1583] within the realm of fundamental rights. In accord with how she 'felt', the complainant in the *Transsexual I Case* adjusted her appearance [*äußeren Erscheinungsbildes*] to that of the female sex to restore the lack of correspondence between *Physis* and *Psyche.* The term *Erscheinungsbild* alludes to the 'unhidden' and signals *ad absurdum* the concealed, psychical dimension of human being-ness that generated the transsexual's desire to come-into-being as a unified human being.

In the *Transsexual I Case* judicial practice relies heavily on empirical insights and takes on a pragmatic, outcome-oriented approach to the phenomenon under scrutiny. The ambiguity associated with the fact that the origin and the cause of transsexualism 'are not yet entirely [*endgültig*] clear […]'[1584] calls for resorting to available research findings re the success of 'attempts to dissuade transsexuals from their psychosexual basic structure through psychotherapy or hormone therapy […].'[1585] According to those findings, such attempts had to that date failed. The Court relied on research findings, namely sources of external justification, for the adoption of the criterion of diagnosed irreversibility of the traversal of the limit in coming-into-being at the psychosexual level.

[1581] Levinas, *Totality and Infinity,* 214 [mysterious participation in causality]
[1582] Heidegger, *Introduction to Metaphysics*, 149
[1583] Rancière, *Dissensus* (2010) 35
[1584] BVerfGE 49, 286 (287); ibid ['In particular it is not clear whether and which are the prenatal determinants of [a person's] evolution into a transsexual.']
[1585] BVerfGE 49, 286 (288)

> The full recognition of the new gender role is, nevertheless, completed for the transsexual only with the change of name and personal status, as medical experts support.[1586]

The *Transsexual I Case* was one of the earliest cases to confront the issue of transsexualism. The above excerpt intimates not only how coming-into-being in life preceded the documentation of the traversal of this limit in law, but also how life and law mutually feed on each other. Olympe de Gouges argued that it was impossible to draw a clear borderline separating bare life and political life, particularly 'when women were sentenced to death as enemies of the revolution.'[1587] Since their bare life, that is, life 'from the standpoint of its being able to be put to death', depended on a political judgment, it was *per se* political[1588]. This holds true analogously for the distinction between bare life and legal life [*Rechtsleben*] in the *Transsexual I Case*[1589].

It is in the *polemos* that the essence of the human being comes forth, discards and supervenes upon limited, man-made classifications and disciplinary boundaries. In the *Transsexual I Case* the *polemos* marks state interference with the most intimate spheres of personality[1590], which caused the ontology of transsexualism to unfold by external force. The law denied transsexuals the traversal of the limit separating life from legal life, the occupation of the part guaranteed to them in view of the law of human dignity, and their establishment within the realm of law as subjects of fundamental rights.

> The complainant, who is, according to the medical opinions before the court, psychically a woman, and through hormone treatments and operations his appearance has adapted, within the realm of the medically attainable, to the perceived [*gefühlten,* felt] gender, is treated as a man against his will in legal life [*Rechtsleben*]. Thus he is denied the possibility of an inconspicuous, socially adjusted life as a woman.[1591]

The self-determination of the complainant was not respected and protected. She was denied a life 'socially adjusted' to her essence. Limits traversed in life, in the

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[1586] BVerfGE 49, 286 (288)
[1587] Rancière (n 1583) 68-69
[1588] ibid
[1589] BVerfGE 49, 286 (297)
[1590] BVerfGE 49, 286 (298) ['[…] the spheres that are affected by these belong to the most intimate area of personality, which in principle is protected against state interference and, in any case, should only be intruded into for reasons of special public interest [cited case omitted].']
[1591] BVerfGE 49, 286 (297)

irruptive unfolding of the essence of human beings, are only fully recognized when law mirrors the ontologically unconcealed human being-ness. Are human beings human? Are transsexuals human? Gender is a fundamental aspect of who the human being is. According to medical experts, transsexuals perceive of their new gender role as complete only with the registration of the new name and the corresponding personal status in the birth registry.[1592] The transsexual seeks the representation in law of the human image in life. Due to the impossibility of sharply separating bare life from legal life, the harmony of *Physis* and *Psyche* is disrupted unless a female first name and personal status are legally recognized. The female first name figuratively occupies the space where pragmatism and symbolism intersect. On the one hand, a female first name would practically prevent conflict situations for the complainant, and on the other, it would positively manifest gender identity.

ii. Filling 'something missing'

Guaranteeing identity between the psychical and physical dimensions of human being-ness in the case of transsexuals amounts to 'mediating and caring, that human beings be human and not inhumane, "inhuman," that is, outside their essence.'[1593] As regards the realm of law, the ontological account of practicing the law of human dignity in the *Transsexual I Case* is apposite to the 'manifestation' of the identity of *Psyche* and *Physis*, namely to the presence of a unified *Menschenbild* at the legal level.

> The lack of identity between exterior appearance and personal legal status is manifested by the fact that it is not possible for [the complainant] to legally bear a female first name. […] Even as far as a gender-neutral name is concerned, conflict situations cannot be excluded […].[1594]

Who is the transsexual? The ontology of transsexualism is intensely inquired into in the *Transsexual I Case.* In a 1974 document of the German Society for Sex Research the essence of transsexualism was found to be 'the complete psychical identification with the other, i.e. with one's own body of conflicting [*widersprechenden*] sex.'[1595] Transsexualism was distinguished from the case of

[1592] BVerfGE 49, 286 (288) ['The full recognition of the new gender role is, nevertheless, completed for the transsexual only with the change of name and personal status, as medical experts support.']
[1593] Heidegger, 'Letter on Humanism' 239, 244
[1594] BVerfGE 49, 286 (297)
[1595] BVerfGE 49, 286 (287)

hermaphrodites in an effort to construe a negative delineation of its meaning. Transsexuals, unlike hermaphrodites, present at the time of birth 'genetically identifiable male or female sex' and normal reproductive organs and functions, rather than 'somatic, physical intersexes.'[1596]

Unfolding, being inside one's essence, coming-into-being is guaranteed under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG, the freedom to develop one's abilities and strengths.

> Human dignity and the fundamental right to the free development of personality demand, therefore, that a human being's civil status is governed by the sex with which he psychically and physically identifies himself. [1597]

The sex of the human being is a foundational experience [*Grunderfahrung*][1598]. 'Something missing' in the case of the transsexual complainant was 'the feeling that he is a man'[1599] as affirmed by medical opinions submitted to the Court, along with 'every externally apparent indication of male sex.'[1600] The Court went on to utter the gendered observation, '[t]his is supported also by his professional activity as a nurse [*Krankenschwester*] […]'[1601], which signifies that social norms too are a cloak of force and 'participate in [the] transformation of perspective into being.'[1602] Ontologically significant traits of transsexualism are the conflict of *Physis* and *Psyche,* experienced as anguish and being outside one's essence[1603], and the human desire for unity [*Einstimmigkeit,* harmony] of *Psyche* and *Physis*.[1604]

The Court evaluated the possible drives underlying transsexualism and stated that sex-change operations are motivated by the desire for unity of *Psyche* and *Physis*, 'rather than sexuality'[1605], and therefore the sex-change operation 'should be viewed' as a necessary course of action towards realizing that goal.[1606] The discussion on the

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[1596] BVerfGE 49, 286 (287)
[1597] BVerfGE 49, 286 (298)
[1598] BVerfGE 49, 286 (299)
[1599] BVerfGE 49, 286 (299)
[1600] BVerfGE 49, 286 (299)
[1601] BVerfGE 49, 286 (299)
[1602] MacKinnon, *Toward a FTS* (1989) 237
[1603] BVerfGE 49, 286 (299) ['The anguish of transsexuals as portrayed in medical texts is impressively confirmed by the medical opinions that were presented in the complainant's case.']
[1604] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 85 [Strack refers to the human desire for unity [*das menschliche Streben nach Einheit*].]
[1605] BVerfGE 49, 286 (299)
[1606] BVerfGE 49, 286 (299)

right of transsexuals to marry indicates that constitutional law, particularly the law of human dignity and fundamental rights, is the critical determinant of perspective and meaning. The irrational moral disapproval by the general population of the marriage of a male transsexual to a man cannot stand in the way of practicing a constitutionally guaranteed right. Thus, spouses should be granted broad latitude to exercise their self-determination in shaping their community of life [*Lebensgemeinschaft*].[1607]

The FCC reacted to the contention of the Federal High Court of Justice re the lack of authority of the judicial power to address regulatory problems pertinent to transsexualism. The precedence of constitutional law – explicitly, fundamental rights – over statutory provisions and its thoroughgoing validity was brought forth in support of the duty of courts to confront the issues raised in the *Transsexual I Case*. To the extent that existing gaps in law can be treated by direct resort to constitutional law provisions, such as Art. 2 sec. 1 GG and Art. 1 sec. 1 GG, these cannot be defined as statutory lacunas in the first place[1608]. Neither the question, why certain values and aspects of life are reflected specifically in constitutional law, is original, nor the response; constitutional law comprises the fundamentals in each given legal order. The crucial question is, rather, what it means to respect and protect the dignity of human beings and to place it in a prominent position among fundamental rights. In the *Transsexual I Case*, 'something missing' as an aspect of human dignity meaning corresponds to the empty space reserved for them within legal life, that is, first and foremost within the realm of fundamental rights.

> Since it is inconsistent with Art. 2 sec. 1 in conjunction with Art. 1 sec. 1 GG to refuse to correct the record on the sex-classification of transsexuals in the birth registry, the duty of courts to deal with this situation in light of fundamental rights standards should not be denied on grounds of absence of a statutory provision. [1609]

The FCC expressed its concern re the point in time when the legal validity of sex-change should develop its effects. It was suggested that *ex nunc* effects would be a constitutionally acceptable treatment of the matter. This position addresses the *a*

[1607] BVerfGE 49, 286 (300) ['Marriage is under the Basic Law (Art. 6 sec. 1 GG) the union of man and woman to fundamentally irresolvable community of life [*Lebensgemeinschaft*] [cited case omitted]. Designing this community according to their perception is the task of the spouses. It may be that among the general population, the marriage of a male transsexual with a man is rejected due to the underlying idea that it is morally disapproved [*zu mißbilligen*]. However, irrational views cannot preclude the substantiation of a marriage [cited case omitted].']
[1608] BVerfGE 49, 286 (303)
[1609] BVerfGE 49, 286 (301)

posteriori identification of 'something missing' once it becomes 'something there', that is, ontologically present within the realm of fundamental rights. Be that as it may, the FCC stated that this decision exceeded the latitude of the constitutional court, and remanded the case to the Federal High Court of Justice.

In the *Transsexual I Case,* the ontological account of human dignity serves to stress the inviolability of human beings' coming-into-being. The state and third parties should refrain from interfering in the happening of the irruption of Being. This movement or unfolding, crossing the limit, moving from a state of concealment towards disclosure, should occur in self-determination, and this proposition encapsulates the ontological meaning of the law of human dignity and explains why I distinguish between forced and the forceful. External intervention impairing the self-determined unfolding brings about the forced disclosure of human being-ness; the forceful alludes rather to the violent quality and intensity of such interference. Restrictions on the self-determined unfolding of human being-ness 'can result from the coexistence of the individual with his fellow human beings, to the extent that these do not touch on the inviolable, innermost sphere of life.'[1610] This remark presents an appropriate transition to the relational, linguistic-analytical and phenomenological, analyses.

b. Linguistic-analytical

The linguistic-analytical approach to the text of the *Transsexuals I Case* allows for the depiction of incompatibility with the constitution as non-subsumption under the legal language game emanating from the eye of the judge when looking through the lens of the Basic Law. External justification and negative delineation are resorted to in order to contour the human image of the transsexual human being and cause the boundaries of the legal language game to fluctuate. The mere cognizance of the viewpoint of the metaphysical subject indicates the relation between the critical eye with authority over the meaning of the legal language game and the broader field of sight and attests to the origin of the concretization of the *Menschenbild* in a relational practice of the law of human dignity. Finally, the moral law alluded to in the decision can be viewed as another lens before the eye of the judge.

[1610] BVerfGE 49, 286 (300)

i. Incompatibility with the constitution as non-subsumption under a legal language game

The FCC held that the decision of the Federal High Court of Justice [*Bundesgerichtshof*] violated the fundamental right of the complainant under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG, reversed the lower court's decision, and remanded the case to the Federal High Court of Justice. In linguist-analytical terms, the FCC identified the non-subsumption of the lower court decision under the legal language game ensuing from looking through the lens of the Basic Law. The viewpoint of the complainant could not be missing from the Court's legal language game. The constitutional complaint rebutted the rejection of the change of sex from 'male' to 'female' in the entry to the birth registry. The elliptical knowledge on and limited understanding of transsexualism and what it stood for at that time can be depicted as 'something missing' by analogy with a *Leerstelle*. The reasons why 'something missing' eventuates in legal language games are as diverse and unique as the context of cases. The legal syllogism reflects the effort to elucidate who the transsexual human being is; sometimes sporadic and patchy, the reasoning of the FCC in the *Transsexual I Case* is a movement into muddy waters.

In disagreement with the contention of the Federal High Court of Justice that judicial power lacked authority to resolve the arising regulation problems, the FCC argued that, to the extent that omissions in statutory law can be addressed by direct resort to constitutional law, here, particularly, to the fundamental right emerging from Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG, one cannot speak of gaps in legal regulation[1611]. The argument restates the all-permeating influence of constitutional law as the lens before the eye that instigates the legal language game. More importantly it underlines the Court's authority over meaning and diagnoses the filling of the *Leerstelle* within the legal language game that incorporates fundamental rights language, and emanates from an eye, as in Wittgenstein's graph, that looks through the lens of the law of human dignity, namely an all-encompassing concept, to produce meaning.

[1611] BVerfGE 49, 286 (303)

ii. Fluctuation of the boundaries of the legal language game: external justification and negative delineation

The FCC first surveyed the present state of knowledge. The employment of insights deduced from a 1974 document of the German Society of Sex Research into the essence of transsexualism can be figuratively rendered as an expansion of the boundaries of the legal language game[1612] in view of the content of the Court's broader field of sight. In that document, transsexualism was defined as 'the complete psychical identification with the other, i.e. with one's own body of conflicting [*widersprechenden*] sex.'[1613] Transsexualism was negatively defined apropos the phenomenon of hermaphrodites: transsexual human beings present at the time of birth no somatic, physical intersexuality, but rather the genetically identifiable male or female sex and the respective 'normal reproductive organs and reproductive functions.' [1614]

Two remarks are vital at this point of the linguistic-analytical analysis: first, the distinction between *Psyche* and *Physis* leaves an imprint on law's *Menschenbild* and constitutes an important element of the portrayal of the legal language game corresponding to the *Transsexual I Case*; and second, the implications of the word 'normal', notwithstanding the fact that its use is not directly attributable to the Court, should be identified at the outset as language requiring exposure to critical reflection. Regardless of whether certain language is directly attributable to the metaphysical subject responsible for producing meaning, all language comprised in legal language games can be compelling in that it signals actors' choices of sources – internal or external – of justification and introduces meaning transduced from other relevant viewpoints into the legal language game. Evidencing the integration of language into the legal language game fleshes out the portrayal of the interplay between life and law.

Ambiguity re the origin and cause of transsexualism[1615] is a sign of 'something missing', that is, of a *Leerstelle* within the legal language game. In quest of the meaning of transsexualism the Court resorted to further medical findings.

[1612] See graph 4 (text to n 495)
[1613] BVerfGE 49, 286 (287)
[1614] BVerfGE 49, 286 (287)
[1615] BVerfGE 49, 286 (287) ['The origin and the cause of transsexualism are not entirely [*endgültig*] clear. In particular it is not clear whether and which are the prenatal determinants of [a person's] evolution into a transsexual.']

Based on those insights, the FCC engaged in negative delineation – namely vis-à-vis homosexuality, fetishism, and psychosexual anomalies and perversions[1616] – of what the *Menschenbild* of transsexual human beings stands for.

> Not sexuality, but the problem of personal self-understanding is of crucial importance to the transsexual, as it manifests in the gender role and the gender identity. The male transsexual rejects the homosexual man and seeks expressly the heterosexually oriented partner. [1617]

Despite the scientific premises of this insight, the language used schematically portrays the motivation underlying transsexualism. Sexuality was explicitly rejected as transsexuals' drive and the problem was framed as one of personal self-understanding. Therefore, the depiction of the meaning, signification and significance, of transsexualism involves the exclusion of certain elements from the portrayal of the *Menschenbild* and the embracement of others. In the *supra* excerpt the nature of motives associated with transsexualism are stipulated rather than indicatively suggested. That the assumption is verified by scientific research does not render the identification of the decisive motive of transsexualism and the presence of language conveying it within the legal language game any less schematic. Premising the allusion to the experienced [*erlebten*] gender identity of transsexuals on scientific insights does not absolve the FCC from the responsibility to critically reflect on the language employed to present scientific results, and to review the phrasing in light of the Basic Law as the lens forming decisively the eye's viewpoint. The inconsistency between the world, namely the realm of life by analogy with the limitless – for the eye – field of sight, and legal life, figuratively rendered a subtotal of the eye's field of sight, is evident in the portrayal of the complainant as a human being who is, if looked at through the lens of medicine, psychically a woman and physically 'within the realm of the medically attainable' attuned to the 'perceived [*gefühlten,* felt] gender', and still a man in legal life [*Rechtsleben*].[1618]

> Because the law on civil status is recognizably based on the premise that a person's first name must reveal the sex of its bearer [cited

[1616] BVerfGE 49, 286 (287)
[1617] BVerfGE 49, 286 (299)
[1618] BVerfGE 49, 286 (297)

> case omitted], the complainant can change his name only after the entry of his sex is changed in the birth registry. [1619]

Is commitment to the 'normal' traced in the *supra* phrasing? Faced with an all-new category, the legal actor, the eye, may seek to appropriate it and to render it graspable within a horizon of language and meaning. The aphoristic tone of propositions in the above excerpt suggests a value judgment re the significance of personal self-understanding[1620] as the motivating force for transsexualism as opposed to sexuality. In another part of the decision 'reliable findings of scientific research' are brought forth in support of the thesis that 'transsexuals do not intend to manipulate their sex.'[1621] The phrasing conveys that, at the time, justifying transsexualism and the intentions underlying it and associating them with an ethically acceptable motivation in accordance with the mainstream were deemed to be essential aspects of the meaning produced.

> According to available research, attempts to dissuade transsexuals from their psychosexual basic structure through psychotherapy or hormone therapy, have to date failed. The only meaningful and helpful therapeutic measure consists, according to scientists, in adapting the body of the transsexual as much as possible to the experienced [*erlebten,* lived] gender identity.[1622]

The boundaries of the legal language game in the *Transsexual I Case* are in a constant state of flux, as insights derived from available research refine the quest for the determination of transsexualism. The insight that transsexuals' problems concern their psychosexual basic structure reinforces the claim that transsexualism entails personal self-understanding complications. Scientific research afforded insights into the experience of transsexualism that permit the approximation of transsexual human beings as manifestations of law's *Menschenbild* and the portrayal of their viewpoint and field of sight as metaphysical subjects. External justification, namely invoking scientific sources in the process of cultivating an understanding of transsexualism, amplified the soundness of assuming the transsexual's viewpoint and incorporating it into the Court's legal language game. The 'only meaningful and helpful therapeutic

[1619] BVerfGE 49, 286 (298)
[1620] Framing the experience of the transsexual as a problem of self-understanding, rather than sexuality, indeed grasps more holistically what is *enjeu* for the transsexual. The process of self-understanding is discussed *infra* in the phenomenological analysis of the *Transsexual I Case.*
[1621] BVerfGE 49, 286 (299)
[1622] BVerfGE 49, 286 (288)

measure'[1623] that can restore the imbalance experienced by the transsexual, is sex-change operations; the experience of imbalance is a central aspect of the portrayal of this concretization of the *Menschenbild*.

iii. Cognizance of the viewpoint of the metaphysical subject in concretizing the *Menschenbild*

The concretization of law's *Menschenbild* in the *Transsexual I Case* is a dichotomized human being. The transsexual experiences conflict between the *Psyche* and the *Physis*. Though physically a man, the complainant was psychically a woman. Through medical intervention her appearance adapted to the perceived [*gefühlten*, felt] gender. The language used here conveys the viewpoint of the transsexual, namely her perception of her gender identity, while the word '*gefühlten*' in the original German text hints at the intensely and immediately impactful experience of gender and, particularly, of belonging to another gender. Whereas within the realm of life, and after she had undergone hormone treatments and operations, the inconsistency between her *Psyche* and *Physis* was restored, in legal life she was still treated as a man against her will.

Human dignity and the fundamental right to the free development of the personality[1624], the Court argued, demand that the civil status of human beings 'is governed by the sex with which [they] psychically and physically [identify themselves].'[1625] Critical reflection is the process of practicing the law of human dignity; in the linguistic-analytical model this proposition translates into maintaining the boundaries of the legal language game in a state of flux, constantly scrutinizing not only the subsumption of concrete manifestations of human being-ness under the legal language game, but also law's relevance to the world or life by analogy with the field of sight simile.

The distinction between legal life and social life is not always clear. This observation applies, apropos the linguistic-analytical model, to the boundaries of the legal language game, which effectively demarcate the realm of law within the totality of life. On certain issues, however, law and life intersect. This is particularly evident in language expressing time-honored, mainstream portrayals of human being-ness.

[1623] BVerfGE 49, 286 (288)
[1624] BVerfGE 49, 286 (298) ['Art. 2 sec. 1 GG when seen in relation to Art. 1 sec. 1 GG guarantees the free development of a person's abilities and strengths.']
[1625] BVerfGE 49, 286 (298)

Does cognizance of the viewpoint of the metaphysical being, the transsexual and, in specific, the complainant, in the end exert formative influence on the perspective transformed into being in producing meaning?

> The principle that derives from our legal order and social life is that every human being is of either 'male' or 'female' sex, regardless of possible anomalies in the genital area.[1626]

The FCC went on to challenge the premises of the decision of the Federal High Court of Justice, namely the absoluteness of 'the thesis on the immutability of sex, which is determined on account of external sexual characteristics at the time of birth'[1627]. The constitutional judge expressed doubts about whether the thesis was 'still tenable in the depicted absoluteness'[1628]. Scientific proof of 'various forms of somatic (physical) intersexuality […]'[1629] along with medical findings documenting 'the dissociation between form [*Morphe*] and psyche' in cases of hermaphrodite births that, according to 'reliable scientific evidence'[1630], apply most sharply to transsexuals, call into question the 'depicted absoluteness' [*geschilderten Absolutheit*] in the lower court's decision.

Be that as it may, stressed the Court, '[t]he "foundational experience" [*Grunderfahrung*] that the sex of a human being is determined, innate and immutable on the basis of his physical sexual characteristics, should not be seriously questioned in light of medical insights on the psychosexuality resulting from inherited and environmental influences.'[1631] Affirming the soundness of the thesis of immutability on grounds of a 'foundational experience' counterbalances the critique of its absolute defense in the contested decision. Reading the two arguments together permits the inference of the Court's reluctance to adopt a position on matters the substance of which it was neither competent to appropriately understand nor responsible to decide on. Rather, a parallel reading indicates how critical reflection is practiced, namely as a movement to and fro between law and life with a view to dissolving the possible arbitrariness of rigid, absolute theses in law's practice, while ensuring law's relevance

[1626] BVerfGE 49, 286 (298)
[1627] BVerfGE 49, 286 (298)
[1628] BVerfGE 49, 286 (298)
[1629] BVerfGE 49, 286 (298)
[1630] BVerfGE 49, 286 (298f.)
[1631] BVerfGE 49, 286 (299)

to the evolution eventuating in life and the Court's integrity as the decisive authority over meaning.

> Art. 1 sec. 1 GG protects the dignity of the human being, as he conceives of himself in his individuality and becomes conscious of his self. This comprises the notion that each human being is autarkic [*über sich selbst verfügen*] and controls his own destiny self-responsibly.[1632]

Attention is cast on the constitutional protection of human dignity under Art. 1 sec. 1 GG. The intended non-determination of law's *Menschenbild,* embraced wholeheartedly in German doctrine and probably presumed in the *supra* excerpt, guarantees availability of space for human beings as metaphysical subjects at the limit of the world, in truth their world, to establish their human being-ness within the realm of law. While the meaning of their human being-ness is produced in self-determination as emanating from their own viewpoint, the introduction of this perception of meaning into the realm of law requires the political, social and aesthetic traversal of the limit. As practiced in the *Transsexual I Case,* the law of human dignity guarantees that the human being has the decisive authority over the meaning of his or her human being-ness in line with the conception 'of himself in his individuality'[1633]. This understanding of the protection of human dignity is attuned to 'the notion that each human being is autarkic' and in control of his or her own destiny in self-responsibility[1634]. The language employed by the FCC brings to mind the ontological reading of 'the disjunction of gods and human beings'[1635] as denoting the self-determination of human beings and the understanding of the transcendental apropos the inviolable limit in the linguistic-analytical account of the law of human dignity.

iv. Another lens before the eye of the judge: the moral law

Another lens before the eye of the constitutional judge in setting limits to the right to the free development of personality is the moral law[1636]. In the *Transsexual I Case* the Court held that the moral law was not violated, yet abstained from deciding the substantive question '[w]hether an operation to change one's sex that is not

[1632] BVerfGE 49, 286 (298)
[1633] BVerfGE 49, 286 (298)
[1634] BVerfGE 49, 286 (298); The notion of self-responsibility is discussed *infra* in the phenomenological analysis of the *Transsexual I Case.*
[1635] Heidegger, *Introduction to Metaphysics*, 149
[1636] BVerfGE 49, 286 (299)

therapeutically necessary should be considered immoral […]'[1637]. Instead it deferred to 'available [expert] opinions' according to which 'a sex-change operation was indicated in the case of the complainant.'[1638] In other words, the FCC only appreciated *ad hoc* the compatibility of law's practice with the moral law, not the moral character of sex-change operations as such[1639]. Judicial practice in the *Transsexual I Case* demonstrates alertness about the ethics 'shown' in the concrete practice of the right to the free development of personality. By emphasizing the scientific foundations of the need for a sex-change operation in the case before it, it effectively resisted moral propositions, that is, 'saying' what can only be 'shown', within its legal language game.

The practice of law's meta-dimension, most paradigmatically conveyed in the law of human dignity and fundamental rights, is manifested in the exercise of authority over meaning in accordance with metaphysical subjects' own perception of the world. The meaning of the moral law, both in its abstraction and concrete practice, evokes the transcendental as in the *Tractatus Logico-Philosophicus*, namely ethics and aesthetics, what cannot be said, only 'shown', the inexpressible or nonsense. The association of 'something missing' as a *Leerstelle* with 'something always missing' surfaces when the transcendental is involved in law's practice. Law's *Menschenbild,* the metaphysical subject, is empty in its abstraction, 'something always missing', and, as such, admitting of *ad hoc* concretizations in lieu of 'something missing' as a *Leerstelle*. The *Leerstelle* allows for concrete imprints of law's meta-dimension, 'something always missing', to feature in legal language games.

The Court's abstention from deriving the meaning of the *Leerstelle* from context and thereby determining the specifics of moral compatibility resulted in a genuinely elliptical legal argument. Reference to moral law in the *Transsexual I Case* hints at its significance but does not elucidate its signification. Various explanations for this stance are conceivable; non-determination of what the moral law signifies could be a sign of judicial restraint, while, subject to a sociological reading, it could

[1637] BVerfGE 49, 286 (299)
[1638] BVerfGE 49, 286 (299)
[1639] As new claims become old, that is, are repeatedly brought before the judge, the clarity and meaningfulness of the language practiced and, consequently, understanding and communication ameliorate. See Baer, *Rechtssoziologie* (2011) 166

indicate reluctance to utter bold assertions on a subject matter that was at that time – and still is – controversial[1640], especially from a mainstream point of view.

c. Phenomenological

The phenomenological analysis enriches the relational account of the practice of the law of human dignity in the *Transsexual I Case* in the linguistic-analytical portrayal. The self's responsibility to respond to the other and the face-to-face encounter in light of the moral law, as well as the theme of absolute separation of the other from the self are examples of the phenomenological themes raised in the following analysis.

i. The portrayal of responsibility as ability to respond to the other

The phenomenological portrayal centers on the notion of responsibility understood as the ability to respond, namely to give a responsible answer to the other. How is the complainant and, more generally, the transsexual human being[1641] as a concretization of law's *Menschenbild* portrayed in the *Transsexual I Case,* and to what extend does the portrayal reflect the ability of the constitutional judge as the speaking self to respond to the other? The other signifies the complainant and the transsexual human being.

The other belongs to 'the persons that have been assigned on the basis of their external sexual characteristics at the time of birth to the male sex [*die aufgrund ihrer*

[1640] Evoking an Anglo-American perspective on judicial interpretation of comparative value, Walzer, *Interpretation and Social Criticism* (Cambridge: Harvard University Press, 1987) 18f. ['[…] a code is a law or a system of laws, while an interpretation is a judgment, the proper work of the judicial branch. The claim of interpretation is simply this: that neither discovery nor invention is necessary because we already possess what they pretend to provide. Morality, unlike politics, does not require executive authority or systematic legislation. We do not have to discover the moral world because it has already been invented – though not in accordance with any philosophical method. No design procedure has governed its design, and the result no doubt is disorganized and uncertain. It is also very dense: the moral world has a lived-in quality, like a home occupied by a single family over many generations, with unplanned additions here and there, and all the available space filled with memory-laden objects and artifacts. The whole thing, taken as a whole, lends itself less to abstract modeling than to thick description. Moral argument in such a setting is interpretive in character, closely resembling the work of a lawyer or judge who struggles to find meaning in a morass of conflicting laws and precedents.']

[1641] The schematism of the phrasing 'transsexual human being' serves solely the purposes of analytical clarity and intelligibility; it does not seek to reproduce arbitrary labeling. This clarification is necessary in view of the danger of understanding transsexual human beings as a solitary class. See, for instance, how the amendment to Colorado's constitution struck down by the Supreme Court of the United States in *Romer v. Evans,* 517 U.S. 620 (1996) included within a specified class of persons homosexuals, lesbians and bisexuals, which, in fact, reflected 'animosity' towards this class of persons and served no rational and legitimate governmental purpose. From a hermeneutic and literary perspective, such examples of practice of language and law heighten the importance of sensitization towards phrasing and framing choices.

äußeren Geschlechtsmerkmale im Zeitpunkt der Geburt dem männlichen Geschlecht zugeordnet worden sind] […]'[1642] but later adjusted their physical appearance to their psychical identification as women. Belonging to 'the' persons 'that' signals the exceptional character of this identification. The passive voice syntactical construction has the effect of non-attribution of the classification at the time of birth to a specific viewpoint with authority over meaning. Classifications presuppose totality structures and aim at rendering the other graspable under the self's vision. The passive voice construction could assumedly imply the state or the mainstream in society as the self; in either case, the viewpoint of the FCC as the self and author of the decision appears to be attuned to the implied viewpoint. Noting that male transsexuals were still 'legally treated as men' [*rechtlich weiterhin als Männer behandelt werden*][1643], the FCC produced another passive voice syntactical structure, which, however, in view of the explicit allusion to the realm of law, probably points to the state in all its expressions as self.

The juxtaposition, first, of psychical condition with physical appearance prior to sex-change operations, and, second, of the other's lived experience with her legal status elucidates what was *enjeu* in the *Transsexual I Case*: life had no traceable imprint on law's *Menschenbild*. The FCC explored transsexualism as a manifestation of human being-ness. The *Transsexual I Case* was one of the first confrontations with the issue in FCC jurisprudence, thus also one of the first attempts to define the responsibility of the self towards the other, in other words the ability to respond to the other. A relational understanding of the practice of the law of human dignity essentially entails the portrayal of the process for cultivating that ability as this surfaces in the text under scrutiny.

The FCC turned to medically grounded insights to explore the meaning of transsexualism and cultivate an appreciation of the viewpoint of the transsexual as the other. The Court, the self, appears to have been prepared to listen and learn from experience as processed and documented in another discipline. Transsexuals experience a conflict, which can be resolved by adjusting their physical appearance to the felt gender. This is driven by 'desire for unity [*Einstimmigkeit*, harmony] of

[1642] BVerfGE 49, 286 (286) ['The complainant is one of the persons that have been assigned on the basis of their external sexual characteristics at the time of birth to the male sex, but later felt they belong in all respects to the female sex and today – after changes to their appearance [*äußeren Erscheinungsbildes*] – live the life of a woman, while continuing to be legally treated as men (male transsexuals).']
[1643] BVerfGE 49, 286 (286)

psyche and nature [*Physis*], rather than sexuality'[1644]. Transsexualism is understood as a 'problem of personal self-understanding […] as it manifests in the gender role and the gender identity'[1645] rather than an issue of sexuality. Empirical medical findings on the motives of transsexualism informed the Court's perspective on the other.

In the *Transsexual I Case*, self-determination, a central aspect of human dignity meaning, refers to the self-portrayal [*Selbstdarstellung*] of the individual outwardly.[1646] Self-portrayal denotes the disclosure of the particulars of individual human beings' self-understanding and personality profile. The wide realm of self-portrayal and self-expression, of constructing a self-determined image of life [*Lebensbild*], and of protection of the data related to personality and the – spatially represented – sphere of personality are long since determined by the general right to personality which has been developed by the FCC through the combined application of Art. 1 sec. 1 GG and Art. 2 sec. 1 GG.[1647]

To assertively state the meaning of transsexualism, the FCC as the self and author of the decision incorporated the informed viewpoint of medical experts into the legal language game to substitute for the viewpoint of the male transsexual, who 'rejects the homosexual man and seeks expressly the heterosexually oriented partner.'[1648] On the basis of medical experts' insights, the viewpoint of the transsexual human being depicted in the *Transsexual I Case* is soundly assumed. The commitment of the Court to sound justification can be interpreted as responsibility.

> […] according to the state of scientific knowledge the male transsexual does not desire homosexual relationships, but rather seeks relations with a heterosexual partner and, after a successful sex-change operation is also capable of engaging in normal sexual intercourse with a male partner. [1649]

Awareness of the self's limited perspective on the other and deferral to the viewpoint of those most competent to understand this multidimensional phenomenon and to portray the other substantiates the ability of the FCC as self to respond. The negative delineation of ability is also a manifestation of responsibility. Notwithstanding the ameliorating effect of external justification by recourse to

[1644] BVerfGE 49, 286 (299)
[1645] BVerfGE 49, 286 (287)
[1646] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 84
[1647] ibid
[1648] BVerfGE 49, 286 (287)
[1649] BVerfGE 49, 286 (300)

scientific sources, a question arises about the significance of expressly and conclusively stating who the other is within the totality of the legal language game corresponding to the *Transsexual I Case*. Such statements about the meaning of otherness can establish a *status quo*, hence disregard 'something always missing' ensuing from the perception of the other as absolutely Other, by permitting the assumption that everything we need to know about the other to be able to respond is already visible; the absolute separation of the other from the self would therefore be ignored. The schematic fashion in which the sexual orientation of the partner rejected or expressly sought by the male transsexual is defined begs the question whether this response to the other occurs as a face-to-face encounter that leaves the distance separating the two entities intact, or, conversely, arbitrarily totalizes and destroys that distance.

Research on transsexualism points to the only responsible answer to the transsexual human being as the other, namely the change of name and personal status in law in line with the new, 'experienced' [*erlebten*][1650] gender identity in life. The occurrence of the face-to-face encounter is discernible in how the complainant, as the other before the Court, is portrayed.

Adapting the appearance of the transsexual human being 'within the realm of the medically attainable' to the perceived [*gefühlten,* felt] gender in life[1651] denotes the scope of responsibility of another self, namely the physician, towards the transsexual as other within the realm of life. Responsibility as ability to respond encapsulates the interrelatedness between responsibility and competence. The physician undertakes the adaptation of the *Physis* to the *Psyche* of the transsexual. Scientific insights set the foundations for the depiction of the human image of the complainant in the *Transsexual I Case*. The choice of language, the 'felt' gender, directly alludes to emotions. A literary approach permits an association of the 'felt gender' with the desire of the transsexual as an *ipse*[1652] to unfold, namely to absorb the own 'felt' otherness into the self. The self's non-response to the other in the *Transsexual I Case* causes the interruption of unity and continuity.

ii. Generosity and hospitality

[1650] BVerfGE 49, 286 (288)
[1651] BVerfGE 49, 286 (297)
[1652] Levinas, *Totality and Infinity*, 39

The FCC deferred to medical experts' authority over meaning: 'for the transsexual' only the change of name and personal status results in the 'full' recognition of the new gender role. The precedence given to the viewpoint of the transsexual apropos what amounts to a full recognition of his or her human being-ness, renders the transsexual as the other the decisive authority over meaning. The production of human dignity meaning is, in that sense, premised on the generosity and hospitality that are, according to Levinas, instituted in language[1653]. It is, indeed, medical experts who defined what full recognition amounts to. Be that as it may, the constitutional judge turned to their knowledge in responsibility for an informed – if only partial – understanding of the other, endorsed insights emanating from their viewpoint, grounded the meaning of the *Menschenbild* and the law of human dignity on those insights, and welcomed the other.

Another portrayal of the incorporation of empirical insights into the legal language game by the constitutional judge as self would emphasize particularly how the transsexual imbues with meaning the concept of human dignity. This enterprise can be figuratively rendered, in light of the phenomenological layer of the introduced model, as the self's relation to the world: the self absorbs the otherness of the world into the self. At the same time, reflection on the world has implications for the relation of the self to the absolutely other. The self as *ipse* listens and learns in the process of absorbing the alterity of the self and the world, and this evolution and knowledge influences the self's ability to respond to the other[1654]. That the complainant 'is treated as a man against his will at the level of law [*Rechtsleben*, legal life]' means that her self-determination is not reflected in the practice of law. Non-response at the legal level, argued the Court, is effectively tantamount to a denial of 'the possibility of an inconspicuous, socially adjusted life as a woman.'[1655]

In Levinas' phenomenology, pre-ethics originates in the practice of language; we put our world into words and offer it to the other in generosity. The effort to understand the other, even when occasionally resulting in schematism and in the articulation of who the other is, is perceived respectively as a manifestation of desire for the Other and a precondition for critical reflection. In articulating who the other is

[1653] Levinas ibid 14 [Introduction by John Wild]; ibid 300
[1654] Knowledge is associated in the thought of Levinas with totality structures under which the other is subsumed; this analysis illustrates in what sense they are an indispensable aspect of the humane practice of law.
[1655] BVerfGE 49, 286 (297)

in the text of the *Transsexual I Case*, the self, egocentric as it is, welcomes the other in hospitality and gives the other a right over this egoism.[1656] Articulation opens up the possibility of critical reflection on the portrayal of the transsexual; the former is a substantiation of generosity, while the latter of hospitality.

iii. The face-to-face encounter: restoring non-response or irresponsibility?

From a phenomenological perspective, the all-permeating force of the law of human dignity lies in a hermeneutic and literary interpretation of the concept as denoting the pre-ethics originating in language: the welcoming of the other as an absolutely Other and the responsible response that maintains the distance separating the self from the other. The self encounters the Other in the face of the other. All human beings partake in infinity, 'something always missing'; the crack in the totality of law guarantees that the other is not subsumed under any sort of totality structure, even legal propositions embodying law's humanism *per se*. In line with this insight, an understanding of transsexualism as a concretization of human being-ness should also not presume a totality structure, for instance the rigidly demarcated realm of law.

The perception of the transsexual human being ensuing from the portrayed meaning in the text of the *Transsexual I Case* is at once the response of the Court, as the speaking self, to the other. From a phenomenological perspective, transsexualism as a concretization of human being-ness and law's *Menschenbild* signifies the absorption of the other into the same. The 'lack of identity' can be described as the state of seeing oneself as other. Levinas argues that this alterity is absorbed by the self and as such is constitutive of the self's *ipseity*. Transsexualism as portrayed in the text of the *Transsexual I Case* is a paradigmatic example of the phenomenological implications of the experienced 'lack of identity'. While in life the alterity of the self is reabsorbed into the new gender identity and, in fact, becomes apparent as a consequence of hormone therapy and sex-change operations, in law the alterity is maintained and amounts to an interruption of human being-ness.

The poetic and rhetorical character of legal recognition is evinced in the Court's observation that '[t]he lack of identity between exterior appearance and personal status is manifested [*zeigt sich schon darin*] by the fact that it is not possible

[1656] Levinas (n 1652) 40

for him to legally bear a female first name.'[1657] Emphasis on manifestation alludes to the notion of the image and the ontological disclosure of human being-ness. The lack of identity between exterior appearance, the image in life, and personal status, the image in law, marks the inconsistency between the imprint on law's *Menschenbild* and the face of the other. The unavailability of legal provision for the change of name and personal status is tantamount to exclusion of the transsexual human being from human being-ness within the realm of law. Such exclusion, I grant of obvious ontological meaning, can be interpreted in light of phenomenological insights either as non-response, if the absence of legal provision is considered a gap in law, or as irresponsibility, that is, failure to respond despite the ability to respond.

The *infra* excerpt directs us towards understanding the manifestation of lack of identity between transsexuals' *Physis* and *Psyche* in the realm of law as an irresponsible response, rather than non-response, to the other. The meaning of practicing the law of human dignity entails responding to and welcoming the other with respect for his or her absolute separation from the self. The constitutional guarantee of human dignity under Art. 1 sec. 1 GG rules out the non-response scenario.

> […] the duty of courts to deal with this situation in light of fundamental rights standards should not be denied on grounds of absence of a statutory provision.[1658]

Due to its higher rank as a constitutional provision and its foundational character in the German Basic Law, the law of human dignity is the critical lens for the production of meaning, the determinant of legal actors' perspective in practicing language in law, and the incarnation of Levinas' pre-ethics. Denying the complainant the change of her first name in the birth registry may therefore be portrayed as irresponsibility towards the face of the other. Since the constitutional guarantee demands the protection of the dignity of human beings 'as they conceive of themselves in their individuality and become conscious of their self.'[1659]

Transsexuals, the other, absolve themselves as self-determined, autarkic and self-responsible individuals from an arbitrary understanding of their human being-ness by a totalize self. Practicing the law of human dignity means responding to

[1657] BVerfGE 49, 286 (297f.)
[1658] BVerfGE 49, 286 (301)
[1659] BVerfGE 49, 286 (298)

human beings while respecting their radical separation from the self. Art. 1 sec. 1 GG guarantees the protection of the dignity of human beings as they conceive of themselves in their individuality and self-consciousness. How can the Court appreciate human beings' self-understanding? As noted *supra*, the Court turned necessarily to the opinions of medical experts.

The mobilization of the law of human dignity in legal language games carries the promise of restoring the correspondence between law and life. The dual sense of 'something missing' as an aspect of human dignity meaning accounts for the open-endedness of responsible answers to the other. The duty of the state to protect the dignity of the human being, understood by analogy with the notion of responsibility in *Totality and Infinity*, involves the task of establishing the ability to respond through recourse to sources of both internal[1660] and external justification, that is, of becoming competent to act in responsibility.

iv. The face-to-face encounter: the moral law

In the text of the *Transsexual I Case*, ethics feature in the statement that the right to the free development of personality under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG guarantees 'the free unfolding of the capabilities and strengths in human beings'[1661], yet 'within the limits of the moral law [*Schranken des Sittengesetzes*].'[1662] Human dignity has been paralleled to the notion of morality in the thought of Levinas on the basis of their propositional commonality as tautologies. Morality 'comes to birth […] in the fact that infinite exigencies […] converge on one point in the universe' and is the basis of solidarity and fraternity. According to the Court, the change of name and legal status in the registry does not compromise the moral law; no threat of that sort is posed by transsexualism. The delimitation of the free unfolding by moral law brings to mind the need to restrict the arbitrariness of freedom stressed in *Totality and Infinity*.

The FCC demonstrated awareness of 'remaining doubts'[1663], that is, ambiguity and controversy, re the phenomenon of transsexualism, its origin and cause, yet argued that 'in the present case', namely the *ad hoc* instance of practice, the exercise of the right to the free development of personality caused no violation of the moral

[1660] The source of internal justification is the constitutional provision in this example.
[1661] BVerfGE 49, 286 (298)
[1662] BVerfGE 49, 286 (299)
[1663] BVerfGE 49, 286 (299)

law. The analysis of the face-to-face encounter in *Totality and Infinity* sheds new light on the meaning of *ad hoc* ascertainment of compatibility with the moral law. The FCC abstained from explicating what the moral law is and why exercising the right to the free development of personality in the specific case is not at odds with that law. For the justification of this assertion the Court rather turned to external sources, the expert opinions affirming the *ad hoc* necessity of the sex-change operation. In other words, the FCC preferred to defer to the ability of experts to respond to the other for the portrayal of the transsexual as a concretization of law's *Menschenbild*, and refrained from taking responsibility for moral statements, probably in view of its own lack of competence to inquire into the deeper motivations underlying transsexualism.[1664]

Committed to the *ad hoc* assessment of compatibility with constitutional and moral law, that is, to the face-to-face encounter with the other and the particulars of the other's self-portrayal and lived experience, the FCC clarified that the immorality of a sex-change operation 'that is not therapeutically necessary' was 'not to be decided here'[1665]. 'Reliable findings of scientific research' on the motivation underlying transsexuals' decision to undergo a sex-change operation show that transsexuals do not intend to manipulate their sex, but rather desire the unity of *Psyche* and *Physis*; hence 'the operation should be viewed as part of this goal's realization'[1666]. In this last statement, the Court assertively directed the reader of the decision as to how medically necessary sex-change operations should be viewed, thus called for the coordination of viewpoints on the matter within society. The Court collated medical texts portraying the anguish of transsexuals and the medical opinions on the conflict experienced by the complainant and concluded that the former were 'impressively confirmed'[1667] by the latter; the FCC thereby deduced that, in the *ad hoc* instance, the sex-change operation could not be deemed immoral.

[1664] BVerfGE 49, 286 (299) ['Whether an operation to change one's sex that is not therapeutically necessary should be considered immoral is not to be decided here. According to the available [expert] opinions, a sex-change operation was indicated in the case of the complainant. According to reliable findings of scientific research transsexuals do not intend to manipulate their sex. The desire for unity [*Einstimmigkeit*, harmony] of psyche and nature [*Physis*], rather than sexuality, stands at the foreground, and in that sense the operation should be viewed [*anzusehen ist*] as part of this goal's realization. The anguish of transsexuals as portrayed in medical texts is impressively confirmed by the medical opinions that were presented in the complainant's case. Accordingly, the sex-change procedure to which the complainant was subjected cannot be regarded as immoral.']
[1665] BVerfGE 49, 286 (299)
[1666] BVerfGE 49, 286 (299)
[1667] BVerfGE 49, 286 (299)

v. The ‘inviolable, innermost sphere of life’ and coexistence with others in fraternity

In the *Transsexual I Case* the Court referred to an established position in FCC jurisprudence, to wit that ‘one’s exclusive right to self-determination of his or her private sphere’ can be subject to limitations on account of the ‘coexistence of the individual with his or her fellow human beings [*Mitmenschen*]’[1668]. The Court argued that such limitations should not ‘impinge on the inviolable, innermost sphere of life.’[1669]

Reference to the *Mitmenschen,* fellow human beings, evokes the notion of fraternity as discussed in Levinas, namely the coexistence of self-referential individualities, rather than the establishment of humanity on resemblance. The self, the human I, is posited to the other in a relation of fraternity. Fraternity is not a moral conquest that informs the meaning of human being-ness, but rather a notion preceding human beings and constitutive of their ipseity. Due to the position of the human being as an I in fraternity, the face of the other can be presented to the self as a face. The inviolability of the ‘innermost sphere of life’[1670] as guaranteed by the fundamental right under Art. 2 sec. 1 GG in conjunction with Art. 1 sec. 1 GG can be perceived as an indication of the radical distance separating the self from the other.

vi. The democratic pedigree of statutory regulation and self-determination as absolute separation of the other from the self

Judicial power constitutes one prong of the state as a self-reflecting self. Judicial review founded on the principle of separation of powers operates as a self-reflection mechanism.[1671] The Court admitted that legal certainty is best served by deferring to the authority of the legislature over that of judicial power to regulate issues concerning the personal status of transsexuals. ‘As long as this has not happened’, the courts could not be denied this task, ‘particularly when the jurisprudence is directly associated with fundamental rights (Art. 1 sec. 3 GG).’[1672] Why is the legislature as a manifestation of state power entrusted with the

[1668] BVerfGE 49, 286 (300)
[1669] BVerfGE 49, 286 (300)
[1670] BVerfGE 49, 286 (300)
[1671] Schnapp (1989) 1, 8
[1672] BVerfGE 49, 286 (303)

construction of totality structures required for regulating the phenomenon of transsexualism, that is, for responding to the other?

The underlying legitimacy consideration translates into legitimacy of exercising authority over meaning. In turn, the latter should be interpreted in accordance with the meaning of the law of human dignity as the guarantee of absolute separation of the other from the self and, consequently, also self-determination of the other. The counter-majoritarian difficulty famously associated with the institution of judicial review precipitates a deficit in self-determination: in democratic constitutional states the shortcomings of – indeed vital to the legal order – totality structures are compensated for by provision for the guarantee of ontologically defined space; are linguistic-analytically understood as recognition of the inviolable limit; and are phenomenologically rendered as absolute otherness. Statutory regulation affords legal certainty not only through its totality structure, but also, more importantly, because of its democratic pedigree that preserves the intersubjective, the social and the relational, hence also the transcendental, in the process of lawmaking, that is, producing meaning.[1673]

4. Concluding observations

'Something always missing' is prerequisite to guaranteeing infinitely possible critical reflection and dissensus re the *ad hoc* filling of 'something missing' with meaning. Critical reflection, genuinely and, in the linguistic-analytical sense of the term, logically, requires the affirmation of a meta-dimension and the possibility of transcendence. In this hermeneutic and literary analysis of the *Transsexual I Case* I have shown how this process eventuates and in the practice of the law of human dignity and guarantees the humane mobilization of that law in the text of legal decisions.

[1673] Schnapp (1989) 1, 8 ['Das vom *BVerfG* bei der Überprüfung von Gesetzen praktizierte Prinzip des sog. judicial self-restraint trägt der aus der parlamentarisch-demokratischen Struktur der Verfassung sich ergebenden politischen Gestaltungsfreiheit des Gesetzgebers gebührend Rechnung; es beugt einer Politisierung der Justiz ebenso vor wie einer Judifizierung der Politik.']

IV. The *Aviation Security Act Case* (2006)[1674]

The Court's reasoning in the *Aviation Security Act Case* has been a point of controversy in German and Anglo-American legal scholarship. The *Aviation Security Act Case* is a panegyrical revival of the *Objektformel* and an illustrative instance of the interplay between the self and the other with respect to the critical actor with authority over meaning under the circumstances of the case. For this, an exhaustive portrayal of viewpoints within the legal language game is deemed vital, and is performed in the linguistic-analytical portrayal. The objectification of human beings most emphatically challenges the *Menschenbild* and its ontological meaning. From a relational, linguistic-analytical and phenomenological, perspective, objectification may be portrayed, respectively, as subsumption under a legal language game or the vision of the self that realizes this non-human image of the other at the level of language. Unless understood, instead, as a tool of critical reflection, uttering *ex negativo* the violation of human dignity only to examine and ascertain or reject its occurrence, the *Objektformel* introduces language that subverts human dignity meaning within the legal language game.

1. Decision

The *Aviation Security Act* [*Luftsicherheitsgesetz* – LuftSiG] authorized the armed forces to shoot down aircrafts intended to be used as weapons in crimes against human lives. The FCC found the respective clause, § 14 sec. 3 LuftSiG, was incompatible with the Basic Law, and, consequently, void, and grounded its decision in two distinct legal bases: federalism and fundamental rights considerations. With regards to the former, the Court held that Art. 35 sec. 2 sent. 2 GG and Art. 35 sec. 3 sent. 1 GG, which regulate the use of armed forces in cases of natural disaster or grave accidents, prohibit the ordering of such missions by the Federation. Issuing such a regulation exceeds, noted the Court, the scope of the legislative powers constitutionally vested in the Federation. The other line of argumentation touches precisely on the constitutional guarantee of human dignity. To the extent that the

[1674] BVerfGE 115, 118 (2006), First Senate of the FCC; Followed by a Plenary Decision on the 3rd of July 2012 [BVerfG, 2 PBvU 1/11 vom 3.7.2012, Absatz-Nr. (1 - 89)], which did not however deal with the fundamental rights issues raised in the judgment of the First Senate, that is, does not affect the human dignity legal language game that portrays the practice of the law of human dignity in the *Aviation Security Act Case*.

employment of armed force to avert danger affects innocent persons on board the aircraft, § 14 sec. 3 LuftSiG is, argued the Court, incompatible with Art. 2 sec. 1 sent. 1 GG in conjunction with Art. 1 sec. 1 GG. In the Court's view, killing innocent human beings on board the aircraft to save those on the ground is tantamount to treating the former as mere objects, hence violating their constitutionally guaranteed human dignity.

Passengers and crewmembers on board experience deadlock, since they are unable to influence the circumstances of their lives, that is, practice self-determination. The rescue operation undertaken by the state in line with § 14 sec. 3 LuftSiG leads to the objectification of desperate individuals on board. They effectively become objects of an operation aiming at the protection of others, hence, noted the FCC, are not respected and protected as subjects of fundamental rights, most importantly, of human dignity. These persons are victims, thus in need of protection; the operation put forward in § 14 sec. 3 LuftSiG is instead equivalent to refusal to protect the victims on grounds of their worth as human beings. Furthermore, stressed the Court, the evaluation of the circumstances that set in motion such an operation cannot rely on a sufficient and correct assessment of facts, due to the particularity of the situation. Most critically, the restricted time available for setting in motion a complex mechanism of execution of the operation is an important pragmatic factor.

Art. 1 sec. 1 GG prohibits intentional attacks against persons finding themselves in a state of despair and helplessness. The Court rejected the assumption that passengers or crew members exercise self-determination in boarding on the aircraft in the first place, thus consent to the possibility of being killed if the circumstances laid out in § 14 sec. 3 LuftSiG arise, as grounds to its line of argumentation. It also refuted the argument that killing innocent persons on board is justified since, under the circumstances, they are anyway going to die, noting that such an assessment renders the operation no less an infringement of Art. 1 sec. 1 GG. The duration of life is not determinant of the constitutional respect for and protection of life and human dignity.

Moreover, according to the FCC, the objectification of human beings under the specific circumstances, namely the figurative yet literal rendering of persons as part of a weapon, is plain to see and signals incompatibility of the statute with Art. 1 sec. 1 GG. The Court discussed a further argument brought forth in legal scholarship,

namely the duty of those on board to sacrifice their life, if that is the only way to protect the state and the constituted body politic from destructive attacks. Finally, the duty of the state to protect those on the ground, whose life is in peril due to the attack, does not influence the decision re the unconstitutionality of § 14 sec. 3 LuftSiG in the situation specified, argued the Court, since the measures employed to deliver upon the duty to protect human life and human dignity on the part of the state should not, as such, be incompatible with the Basic Law.

The FCC considered the alternatives of a pilotless aircraft and of an aircraft aboard which the only passengers are persons intending to employ it as a weapon against the lives of those on the ground. In these cases, decided the Court, shooting down the aircraft in accordance with § 14 sec. 3 LuftSiG is compatible with Art. 2 sec. 2 sent. 1 GG and Art. 1 sec. 1 GG. In the second alternative, the direct use of armed force, argued the FCC, corresponds to the attacker's criminal conduct and is therefore in line with treating him or her as a self-responsible subject of fundamental rights exercising self-determination. What is more, if the only ones on board the aircraft are the perpetrators of the crime, the principle of proportionality is conformed to. Although the state indeed infringes on the right to life of the attackers, such state intervention is justified in view of the seriousness of the event and the purpose served by § 14 sec. 3 LuftSiG. Since the attackers' actions, for which they are held responsible, occasion state intervention by means of an armed force operation, and since the perpetrators can avert the danger by abstaining from carrying out the crime at any time, the gravity of the offense to their fundamental rights is substantially toned down.

In sum, § 14 sec. 3 LuftSiG was found void, not only because the Federation lacked the legislative competence to order the employment of armed forces, but also on fundamental rights, particularly human life and human dignity considerations.

2. Discussion

The protection of human dignity in Art. 1 sec. 1 GG stands clearly higher to that of life.[1675] The fundamental right to life can be subject to legal restrictions, of course only to the extent that these serve the protection of the life of others and under

[1675] Kunig, Art. 1, *GG Kommentar* (2012) para 5

strict conditions.[1676] According to Kunig, the fundamental right to life can be balanced, for instance, when a greater group of human beings is at risk or the state as such is in danger. Be that as it may, the state can never expect of a human being to sacrifice his or her human dignity.[1677] The two fundamental rights, combined, result in a categorical imperative, which becomes particularly sharp in the extreme scenario of the *Aviation Security Act Case.*[1678]

Human dignity in Art. 1 sec. 1 GG is understood as direct reaction against the National Socialist regime.[1679] Human beings shall not be treated merely as objects by the state or third parties, shall not be left at the total disposal of other human beings, cannot be objectified, cannot be perceived as numbers in a collectivity or as cogs in a wheel'[1680] and, as a consequence, be stripped of individual spiritual-moral or physical existence.[1681] The *Objektformel* doctrine originates in the ethics of Kant[1682] and the thought of Wintrich.[1683] As formulated by Dürig, the *Objektformel* has become a prevailing pattern of interpretation. Shortcomings in the practice of this doctrinal formula are associated with the difficulty of reliable prognosis of human dignity violations and the decisionism reflected in the treatment of violations [*dezisionistische Handhabung*][1684]. The deficiency of the *Objektformel,* observes Herdegen, is best understood apropos the proposition in the thought of Kant[1685] that human beings be treated not 'only' as means but 'also' as ends.[1686] Herdegen, bringing up the example of the *Peep-Show Case*[1687], argues that the *Objektformel* easily lapses into an invocation pattern of a certain instrumentalization rhetoric

[1676] ibid
[1677] ibid
[1678] ibid
[1679] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 17
[1680] ibid
[1681] ibid
[1682] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 36; Starck, ibid
[1683] Josef M. Wintrich, 'Über Eigenart und Methode verfassungsgerichtlicher Rechtsprechung' (1952) *Festschrift für Wilhelm Laforet* 227, 235 ff. ['[…] muß aber der Mensch auch in der Gemeinschaft und ihrer Rechtsordnung immer "Zweck an sich selbst" (Kant) bleiben, darf er nie zum bloßen Mittel eines Kollektivs, zum bloßen Werkzeug oder zum rechtlosen Objekt eines Verfahrens herabgewürdigt werden.']; Cf. critically, Josef M. Wintrich, 'Die Bedeutung der "Menschenwürde" für die Anwendung des Rechts' (1957) *BayVBl.* 137, 140; See also Herdegen ibid para 36; ibid para 36 fn 1
[1684] Herdegen ibid
[1685] Herdegen notices, however, the problematic implications of the Kantian interpretation of means and ends for the practice of the law of human dignity. Herdegen ibid para 36; ibid para 36 fn 4; ibid para 36 fn 5
[1686] Herdegen ibid
[1687] BVerfGE 64, (278) [*Peep-Show Case*]; Opposing, Hoerster (1983) 93, 95f.

[*Instrumentalisierungsrhetorik*]. The problems of the *Objektformel*[1688] are also acknowledged in FCC jurisprudence, albeit repeated employment of this doctrine in practicing the law of human dignity.[1689] The *Objektformel* doctrine has not to date been displaced in its entirety by another interpretive approach to the meaning of human dignity violations.[1690]

> Die Menschenwürde ist getroffen, wenn der konkrete Mensch zum Objekt, zu einem bloßen Mittel, zur vertretbaren Größe herabgewürdigt wird.[1691]

Herdegen notes that the tautological element of the *Objektformel* accounts not only for the problems arising from its practice but also for its attractiveness.[1692] It cannot be denied that there are forms of instrumentalization, which are ethically legitimate.[1693] Whether instrumentalization occurs depends on the evaluation of the concrete facts of a case before the Court.[1694] The *Objektformel* functions as a generalized formula applied in such instances of violation for which there is strong evidence and consensus, namely most cases entailing a negative determination of human dignity meaning.[1695]

[1688] BVerfGE 30, 1 (25 f.) [*Wiretapping Case, Abhör-Urteil*] ['Was den in Art. 1 GG genannten Grundsatz der Unantastbarkeit der Menschenwürde anlangt, der nach Art. 79 sec. 3 GG durch eine Verfassungsänderung nicht berührt werden darf, so hängt alles von der Festlegung ab, unter welchen Umständen die Menschenwürde verletzt sein kann. Offenbar läßt sich das nicht generell sagen, sondern immer nur in Ansehung des konkreten Falles. Allgemeine Formeln wie die, der Mensch dürfe nicht zum bloßen Objekt der Staatsgewalt herabgewürdigt werden, können lediglich die Richtung andeuten, in der Fälle der Verletzung der Menschenwürde gefunden werden können. Der Mensch ist nicht selten bloßes Objekt nicht nur der Verhältnisse und gesellschaftlichen Entwicklung, sondern auch des Rechts, insofern er ohne Rücksicht auf seine Interessen sich fügen muß. Eine Verletzung der Menschenwürde kann darin allein nicht gefunden werden. Hinzukommen muß, daß er einer Behandlung ausgesetzt wird, die seine Subjektqualität prinzipiell in Frage stellt, oder daß in der Behandlung im konkreten Fall eine willkürliche Mißachtung der Würde des Menschen liegt. Die Behandlung des Menschen durch die öffentliche Hand, die das Gesetz vollzieht, muß also, wenn sie die Menschenwürde berühren soll, Ausdruck der Verachtung des Wertes, der dem Menschen kraft seines Personseins zukommt, also in diesem Sinne eine "verächtliche Behandlung" sein.' (spelling as in the original text)].
[1689] See BVerfGE 9, 89 (95) (1959) [*Gehör bei Haftbefehl*]; BVerfGE 27, 1 (6) (1969) [*Mikrozensus*]; BVerfGE 28, 386 (391) (1970) [*Kurzzeitige Freiheitsstrafe*]; BVerfGE 45, 187 (228) (1977) [*Life Imprisonment Case*]; BVerfGE 50, 166 (175) (1979) [*Ausweisung I*; expulsion of alien convicted for illegal possession of weapons]; BVerfGE 87, 209 (228) (1992) [*Tanz der Teufel*]; BVerfGE 115, 118 (161 ff.) (2006) [*Aviation Security Act Case*]; See Herdegen (n 1682) para 36
[1690] Herdegen (n 1682) [how the *Objektformel* is essentially practiced in ECtHR jurisprudence, specifically *Tyrer v. United Kingdom*]
[1691] Dürig, Vorauflage, *Grundgesetz: Kommentar* (1958) para 28; ibid (1956) 81 *AöR* 117, 127; See also Enders (1997) 20ff.; Peter Häberle, 'Die Menschenwürde als Grundlage der staatlichen Gemeinschaft', in Josef Isensee & Paul Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (Bd. 1, 3rd edn, Heidelberg: C. I. Müller, 2004) 317 para 43
[1692] Herdegen (n 1682)
[1693] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 89
[1694] ibid
[1695] ibid

The *Objektformel* comes in for serious objections. These surface frequently in the argumentation of the FCC. [1696] While the *Objektformel* may be of assistance in identifying conventional and evident cases of human dignity violations, it otherwise presents weaknesses. As Dreier puts it, this formula is extremely vague and thus it is fair to call it, as is often the case, an empty formula or an empty shell [*Leerformel oder leere Hülse*] [1697]. The vagueness, thus need for concretization, of the Kantian foundations of the *Objektformel* doctrine is affirmed in Schopenhauer's criticism of Kant.[1698] The most important argument against the *Objektformel* as a *Leerformel* is that, according to Dreier, 'its ostensibly ideologically indifferent phrasing turns out to be, at closer look, a *passe-partout* for all sorts of subjective valuations'[1699]. A pragmatic approach to the practice of the *Objektformel* in human dignity legal language games would unveil that, unavoidably, human beings are sometimes treated as means, rather than ends, in everyday life.[1700] The employment of the *Objektformel* in pursuit of violation-based determinations of the meaning of the law of human dignity entails the identification of challenges to the subject-quality of human beings or deliberate disrespect for their dignity. This approach is not absolutely functional, minding that even an unintentional violation of human dignity infringes on the legal guarantee under Art. 1 sec. 1 GG. In other words, when human beings are objectified,

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[1696] ibid para 53; See BVerfGE 9, 89 (95) (1959) [*Gehör bei Haftbefehl*]; BVerfGE 27, 1 (6) (1969) [*Mikrozensus*]; BVerfGE 28, 386 (391) (1970) [*Kurzzeitige Freiheitsstrafe*]; BVerfGE 45, 187 (228) (1977) [*Life Imprisonment Case*]; BVerfGE 50, 166 (175) (1979) [*Ausweisung I*; expulsion of alien convicted for illegal possession of weapons]; BVerfGE 50, 205 (215) (1979) [*Strafbarkeit von Bagatelldelikten*, criminalization of minor offenses]; BVerfGE 57, 250 (275) (1981) [*V-Mann*, right to fair trial of the accused and limited reliability of anonymous informant as witness of 'hearsay']; BVerfGE 72, 105 (116) (1986) [*Life Imprisonment*]; BVerfGE 87, 209 (228) (1992) [*Tanz der Teufel*]

[1697] Dreier ibid 89; ibid para 53 fn 168

[1698] Schopenhauer, *The World As Will And Idea*, 447 [450] ['If a prince desires to extend mercy to a criminal who has justly been condemned, his Ministers will represent to him that, if he does, this crime will soon be repeated. An end for the future distinguishes punishment from revenge, and punishment only has this end when it is inflicted *in fulfillment of a law*. It thus announces itself as inevitable in every future case, and thus the law obtains the power to deter, in which its end really consists. Now here a Kantian would inevitably reply that certainly according to this view the punished criminal would be used 'merely as a means.' This proposition, so unweariedly repeated by all the Kantians, 'Man must always be treated as an end, never as a means,' certainly sounds significant, and is therefore a very suitable proposition for those who like to have a formula which saves them all further thought; but looked at in the light, it is an exceedingly vague, indefinite assertion, which reaches its aim quite indirectly, requires to be explained, defined, and modified in every case of its application, and, if taken generally, is insufficient, meagre, and moreover problematical.']

[1699] Dreier (n 1697)

[1700] See Badura (1964) *JZ* 337, 342; Luhmann, *Grundrechte als Institution* (1965) 60; ibid 60 fn 18; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 111 [examples of treatment of human beings as objects in private and public life]; BVerfGE 30, 1 (25 f.)

the intentions of violators, even when these act 'in good faith', do not decisively influence the ascertainment of the occurrence of a human dignity violation.[1701]

When violations of human dignity are attributed neither to the manner of treatment, nor to the conclusive aim [*Finalität*] of an action, namely, respectively, the conscious volition to harm on the one hand, and the ethnic-racial or generally disrespectful of human dignity discrimination on the other, then the *bilanzierende Gesamtbetrachtung* [balanced overall assessment] of *ad hoc* instances of practice is, so argues Herdegen, the appropriate method of evaluation of physical and psychical infringements on human dignity and permits an appreciation of how the highest legal interests should be preventively protected.[1702] The problems associated with the treatment of such infringements on human dignity would be diminished, if the coercive measures employed were judged purely as human dignity violations in utter abstraction from the intended protection of life.[1703] The balancing necessary, argues Herdegen, does not have to operate at the inter-norm level of the colliding provisions, that is, Art. 1 sec. 1 GG and Art. 2 sec. 2 sent. 1 GG; rather, balancing is immanent [*normimmanent*] to the norm and occurs through the concretization of the claim to human dignity.[1704] This process calls for 'reliable normative control in light of the value order of the Basic Law'.[1705] In that sense, the content of the human dignity claim cannot be detached from the protection of life or any other constitutional value.[1706] The constitutional guarantee of human dignity reaches it's apogee in instances where human beings threaten the human dignity of other human beings.[1707]

In the *Aviation Security Act Case*, the FCC distinguished between the hijackers and those hijacked by reference to situation- and role-based distinct spheres of control and responsibility contoured by looking at factual context.[1708] The requirement of concretization in practicing the law of human dignity is manifested in the *Aviation Security Act Case*.[1709] Whoever rejects the *ad hoc* concretization of the

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[1701] Dominant position in the legal literature: Dreier (n 1697) para 53; Geddert-Steinacher (1990) 46; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 110-11; Kloepfer (2001) 77, 94
[1702] Herdegen, Art. 1 Abs. 1, *GG Kommentar* (55. Lfg., May 2009) para 50
[1703] Herdegen ibid; Cf. Kloepfer (2001) 77, 97f.; See also Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 78
[1704] Herdegen ibid
[1705] ibid
[1706] Affirmed in BVerfGE 49, 24 (53) [incommunicado]
[1707] See Dürig (1956) 81 *AöR* 117, 128; Kloepfer (n 1703) 97
[1708] BVerfGE 115, 118 (160 ff.)
[1709] BVerfGE 115, 118 (153); Consistently with BVerfGE 30, 1 (25) [*Wiretapping Case* – ['*Abhör-Urteil']*; BVerfGE 109, 279 (311) [eavesdropping; *'Großer Lauschangriff-Urteil']*

claim to human dignity through a situational overall assessment [*situative Gesamtwürdigung*], argues Herdegen, discards the value of considering circumstances; such is the interconnectedness of actors and circumstances in practicing the law of human dignity, that refraining from an overall assessment leads the reasoning to a point where 'the roles of the perpetrator and the victim make no difference.'[1710]

Other voices in German legal literature explicitly express abstention from the *Objektformel* and[1711], rather, opt for another approach that essentially presupposes positive legal [*positiv-rechtlich*][1712] grounds for ascertaining human dignity violations.[1713] As argued by Wieacker[1714], the positive legal order has windows to supra-positive standards, which enable a certain view and indicate what is referred to presently as the meta-dimension of law.[1715] Without openness towards the supra-positive, recourse to pre-positive [*vorpositive*] standards is not acceptable [*zulässig*].[1716] The close proximity of this position in the doctrinal discourse to an affirmative stance towards 'something missing' is plain to see.[1717]

The state has, in view of Art. 2 sec. 1 GG, the duty to protect human life against attacks by third parties.[1718] Repressively effective criminal law measures and, to the extent possible, preventively effective measures of police law, as well as maintenance of a competent police force can be employed to those ends. If, in absence of milder means, the active protection of life threatens the life of the attacker, a balancing of conflicting interests needs to be undertaken[1719]; the life of those attacked has priority over the life of the attacker. [1720] This does not challenge the status of the attacker as a legal subject of fundamental rights, because the attack falls within his or her sphere of authority.[1721] Attacks against innocent human beings, such

[1710] Herdegen (n 1702); Josef Isensee, 'Menschenwürde: die säkulare Gesellschaft auf der Suche nach dem Absoluten' (2006) 131 *AöR* 173, 193
[1711] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 17
[1712] ibid
[1713] Starck (1981) *JZ* 457ff.
[1714] Franz Wieacker, *Zum heutigen Stand der Naturrechtsdiskussion* (Köln und Opladen: Westdeutscher Verlag, 1965) 12 ['Es bleibt ein Paradox, überpositives Recht durch die positive Gesetzesregel selbst einfangen zu wollen – etwa so, wie die Schildbürger, die in ihrem Rathaus die Fenster vergessen hatten, das Sonnenlicht nun in Säcken hineinzutragen gedachten.']
[1715] Wieacker ibid; See also Badura (1964) *JZ* 337, 340; Starck (n 1711) para 17 fn 71
[1716] Starck (n 1711) para 17 fn 71
[1717] ibid para 17
[1718] ibid para 92
[1719] ibid
[1720] ibid para 98
[1721] BVerfGE 115, 118 (161ff.) [*Aviation Security Act Case*]

as the passengers and crew of the aircraft in the *Aviation Security Act Case*, cannot be addressed in the same way as when the only human beings threatened by state action are the attackers, because that would render the former defenseless objects not only of the attackers but also of the state. [1722]

The 'final rescue shot' [*finale Rettungsschuss*][1723] by police forces against the perpetrator for the protection of life and limb constitutes the *ultima ratio* and, thus, not an infringement on his or her human dignity.[1724] Accepting the killing of innocent human beings for the protection of the lives of others cannot be justified on the basis of the guarantee of human dignity under Art. 1 sec. 1 GG, which categorically prohibits the balancing of life v. life.[1725] This proposition curtails the problem of balancing constitutional interests of equally high rank.[1726] According to Herdegen, the violation of human dignity 'can' be found in a violation of the fundamental right to life, if, for instance, killing many to save few is accepted, that is, the principle of proportionality is blatantly disregarded.[1727]

> The claim to dignity of every human being denies the state the making of a choice tailored to the essence [*Sosein*] of the individual by setting itself up as the judge of the 'value' [*Wertigkeit*] of individual human life. The balancing of loss and of the protection of human life violates the claim to human dignity in that the equivalence of human existence is as such put into question. The problem is accepting the killing of non-participants in the crime in light of human dignity, if turning to life is not a means but indeed an inevitable (and in that sense also necessary) consequence of the defense against danger. [1728]

The right to life can affect human dignity when the state demands of the individual to sacrifice him or herself for the public interest in the name of solidarity.[1729] In the *Aviation Security Act Case,* the shooting down of an aircraft with innocent passengers and crew on board to save the victims on the ground is

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[1722] BVerfGE 115, 118 (153ff.)
[1723] Herdegen (n 1702) para 96; Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 68
[1724] Herdegen ibid
[1725] ibid
[1726] ibid
[1727] ibid
[1728] ibid
[1729] Herdegen ibid [Only in the state of war is such sacrifice on the part of the victim constitutional, namely in the military service of conscripts and voluntarily serving soldiers.]; Otto Depenheuer, 'Das Bürgeropfer im Rechtstaat – Staatsphilosophische Überlegungen zu einem staatsrechtlichen Tabu' in Otto Depenheuer, Markus Heintzen, Matthias Jestaedt & Peter Axer, eds., *Staat im Wort, FS für Josef Isensee* (Heidelberg: 2007) 43; See Christoph Enders, Art. 1, in Karl Heinrich Friauf & Wolfram Höfling (eds), *Berliner Kommentar zum Grundgesetz* (Loseblattsammlung since 2000, Berlin: Erich Schmidt Verlag, July 2005) para 93

considered an objectification of human beings on board that violates their dignity.[1730] According to Herdegen, this verdict attributes ultimately no decisive significance to the already encountered authority of the hijackers over their victims and their lives by the state.[1731] What is more, the FCC equates the undoubtedly existing difficulties of reliable assessment of threat in a situation of general insecurity to the exclusion of any margin of prognosis.[1732] Assessing categorically the violation of the human dignity of those hijacked, the Court was faced with the issue of dealing with terrorist attacks within the realm of constitutional law.[1733]

Certain points of concern encountered along this line of argumentation are identified in German legal literature: first, whether existential threats to the community justify a restriction of the dignity of individuals;[1734] second, whether the association of the right to life of the victims of an externally controlled and lethal operation with human dignity in the *Aviation Security Act Case* is under-complex.[1735] The shooting down of a hijacked aircraft in a terrorist attack cannot be interpreted as sacrifice grounded in solidarity on the part of individuals[1736]; thus, the nationality of the hostages need not raise practically any further considerations.[1737]

3. Analysis

The following analysis commences with an ontological portrayal of the experience of deadlock and its association with objectification, struggles with the distinction between human dignity as a fact (descriptive) and as law (prescriptive), and draws attention to the *Objektformel* doctrine as perceived when looking through the introduced lens in this hermeneutic and literary approach to the practice of the law

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[1730] BVerfGE 115, 118 (153ff.)
[1731] Herdegen (n 1702); In disagreement with this position, Otto Depenheuer, *Selbstbehauptung des Rechtsstaates* (2nd edn, Paderborn, München, Wien, Zürich: Ferdinand Schöningh, 2007) 95ff. [*Bürgeropfer* , citizen-victims]
[1732] Herdegen ibid
[1733] For the international humanitarian law implications of the killing of innocent people by terrorists see Herdegen (n 1702) para 96 fn 4; Andreas Zimmermann & Robin Geiß, 'Die Tötung unbeteiligter Zivilisten: Menschenwürdig im Krieg?' (2007) 46 *Der Staat* 377, 387ff.; See Art. 51 UN Charter (1945); See UN Security Council Resolution S/Res. 1373/2001 (28.9.2001); See for an analysis of the disposition of the German legal order towards terrorism and particularly the 'September 11' events in the United States, yet prior to the adoption of the Aviation Security Act, Kim Lane Sheppele, 'Other People's Patriot Acts: Europe's Response to September 11' (2004) 50 *Loyola Law Review* 89; Kim Lane Scheppele, 'We Are All Postr-9/11 Now' (2006) 75 *Fordham L. Rev.* 607
[1734] Herdegen ibid para 96
[1735] ibid
[1736] ibid
[1737] ibid

of human dignity. Human dignity as morality and the notions of responsibility, hospitality and generosity surface in the analysis. Finally, reflections on sacrifice and an interpretation of the principle of proportionality in light of Levinas' conception of the intersubjective space in *Totality and Infinity* turn the spotlight on the hermeneutic outreach of a story of 'something missing'.

a. Ontological

The ontological portrayal of the *Aviation Security Act Case* casts the focus primarily on the ontologically relevant traversal of limits, precisely because under the circumstances of the case, this possibility is foreclosed for innocent passengers and crew on board the aircraft. Objectification is most vividly portrayed in the *Aviation Security Act Case* because, besides constituting a simile, 'like objects' or 'as objects', it actually materializes. The ontological analysis engages, furthermore, in another reading of the discussion on the descriptive or prescriptive meaning of the law of human dignity. From a hermeneutic and literary perspective, the happening of *polemos* is plain to see; the ontologically significant implications of that event thus need to be addressed.

i. The experience of deadlock: objectification on the borderline between the literal and the non-literal[1738]

The *Aviation Security Act* was challenged on the grounds that it permitted the state to intentionally kill the victims of a crime, in other words attack those who, through no volition of their own, have become part of the aircraft that the perpetrators intend to use as a weapon. Unable to exercise self-determination under the circumstances, human beings are stripped of their human being-ness, that is, forced 'outside [their] essence'.[1739]

The experience of deadlock, a recurring underlying theme in the portrayal of human dignity violations, features most evocatively in the *Aviation Security Act Case*. Regarding the passengers as part of the weapon that the hijacked plane has been turned into renders them 'mere objects of state action and deprives them of their

[1738] Stephen J. Greenblatt, *Renaissance Self-Fashioning: From More to Shakespeare* (Chicago: University of Chicago Press, 1980) 4 ['[…] the facts of life are less artless than they look, […] both particular cultures and the observers of these cultures are inevitably drawn to a metaphorical grasp of reality […].']
[1739] Heidegger, 'Letter on Humanism' 239, 244

human quality and dignity.'[1740]. Through an ontological lens, the objectification of human beings translates most emphatically into being outside one's essence, or in Heidegger's words, being 'inhuman'.[1741] In the *Aviation Security Act Case* the proximity of the literal and metaphorical occurrence of objectification is striking. 'The Act makes them [human beings] mere objects of state action.'[1742] The powerful figurative rendering effectuated by objectification language in the *Aviation Security Act Case* and the aptness of an ontological reading are evident in the *infra* passage, where the transformation of perspective into being is most vividly depicted.

> The opinion expresses in a virtually undisguised manner [*bringt geradezu unverhohlen zum Ausdruck*] that the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects [*dass die Opfer eines solchen Vorgangs nicht mehr als Menschen wahrgenommen, sondern als Teil einer Sache gesehen und damit selbst verdinglicht werden*].[1743]

The *Menschenbild* of the Basic Law and the 'virtually undisguised' manifestation of an ontology so diametrically opposed to that of human being-ness, namely the perception of human beings as components of a weapon, that is, of an object, are irreconcilable. That innocent human beings on board become objects is due to the fact that they are viewed as part of an object first by the perpetrators and second, as the Court argues, by the state shooting down the hijacked aircraft.

The duty of the state to protect every human life and prohibit encroachments upon the fundamental right to life by state action is grounded in the relation between the right to life and human dignity. The constitutional protection of human life and human dignity is not contingent on 'the duration of the physical existence of the individual human being'[1744], namely on quantitative considerations. What is more, it is not decided on the basis of cost-benefit analysis, but rather as a matter of principle. Harm – in the multiplicity of its manifestations – and deadlock are dominant themes in the portrayal of infringements on the respect for human dignity ensuing from FCC

[1740] BVerfGE 115, 118 (126); Starck (1981) *JZ* 457, 459f. [representative list of cases of objectification]
[1741] Heidegger (n 1739)
[1742] BVerfGE 115, 118 (126)
[1743] BVerfGE 115, 118 (158f.)
[1744] BVerfGE 115, 118 (158); ibid (152) ['All human beings possess this dignity as persons, irrespective of their qualities, their physical or mental state, their achievements and their social status [cases omitted]. It cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it [cases omitted]. This applies irrespective, *inter alia*, of the probable duration of the individual human life [cases omitted].']

jurisprudence. Deadlock situations are impedimental to the unforced traversal of limits, and this foreclosure of escape is the flipside of self-determination and self-responsibility. The language employed by the FCC communicates the experience of despair as a consequence of deadlock, thereby enhancing the portrayal of the inhuman.

> In such an extreme situation, which is, moreover, characterized by the cramped conditions of an aircraft in flight, the passengers and the crew are typically in a desperate situation. They can no longer influence the circumstances of their lives independently from others in a self-determined manner. [1745]
> Whoever denies this or calls this into question denies those who, such as the victims of hijacking, are in a desperate situation that offers no alternative to them precisely the respect which is due to them for the sake of their human dignity […].[1746]

Who is the human being? Practicing self-determination in freedom is explicitly regarded as an integral aspect of human *φύσις* in the above excerpt. The *Objektformel* doctrine associates the guarantee of legal subjects' self-determination with the prohibition of objectification.[1747] A hermeneutic and literary approach to this doctrine indicates a leap from the definition of the human being as a creature practicing self-determination to the assertion that it may not be reduced to a mere object of state action.

ii. The law of human dignity: on the borderline between fact[1748] and law

Statutes restricting the fundamental right to life under Art. 2 sec. 2 sent. 1 GG must 'be regarded in light of the fundamental right and of the guarantee of human dignity under Art. 1 sec. 1 GG, which is closely linked with it.'[1749] The right to life, framed as a liberty right under Art. 2 sec. 2 sent. 1 GG, guarantees the protection of the biological and physical existence of every human being against encroachments by the state 'from the point in time of its coming into being until the human being's death, independently of the individual's circumstances of life and his or her physical state and state of mind.'[1750] It is obscure whether the phrasing of the proposition '[e]very human life as such has the same value [citing the *Abortion I Case,* BVerfGE

[1745] BVerfGE 115, 118 (154)
[1746] BVerfGE 115, 118 (158)
[1747] Starck (1981) 457, 459f.
[1748] 'Fact' should not be confused with an indication of the propositional fact.
[1749] BVerfGE 115, 118 (152)
[1750] BVerfGE 115, 118 (139)

39, 1 (59)]'[1751] affirms a fact or implies a norm. Law as a cloak of force, in postulating anthropocentrism, effectively transforms into being the egalitarian pedigree of fundamental rights as it surfaces in the quoted passage both formally and substantively.[1752] Beyond doctrinal controversy and dominant opinions in the legal discourse, the ontological account of the law of human dignity directs us to seek the meaning of propositions on the borderline between fact and norm and, analogously, natural law and positivism uttered in practicing fundamental rights[1753].

The present analysis aims at demonstrating another possible understanding of the interplay between the fact and the law of human dignity. The key question is, why preserving the distinction between the fact and the law, that is, between Art. 1 sec. 1 sent. 1 GG and Art. 1 sec. 1 sent. 2 GG, and, consequently, allowing for their interplay, matters. Law transforms perspective into being, and the human being is the 'the most emphatic form of an ought'. A hermeneutic and literary approach to the text of the *Aviation Security Act Case* zooms in on the language employed in defining who the human being is in light of the law of human dignity.

> All human beings [*Jeder Mensch*] possess [*besitzt*] as persons this dignity, irrespective of their qualities, their physical or mental state, their achievements and social status [cited cases omitted].[1754]

Who the human being is, is not concretely determined, but rather remains an open question as 'irrespective of' indicates. Human beings 'possess' human dignity, and, as the phrasing suggests, this can be perceived to be a fact[1755]. Understanding human dignity as a possession of every human being is tantamount to recognizing it as a quality of human being-ness, in other words an integral aspect of who the human being is. The inextricability of the link between human being-ness and human dignity is further highlighted by the proposition that '[i]t cannot be taken away from any human being.'[1756] It can be inferred that 'something missing', incidental to the open-endedness of the interrogative 'Who is the human being?', constitutes an aspect of human dignity meaning. The fact that every human being possesses human dignity

[1751] BVerfGE 115, 118 (139)
[1752] MacKinnon, *Toward a FTS* (1989) 237
[1753] Denninger (1982) *JZ* 225
[1754] BVerfGE 115, 118 (152)
[1755] See Nissing, 'Vorwort' in ibid (ed), *Grundvollzüge der Person* 7, 7 ['Personsein heißt: eine Natur zu haben, eine Weise des Lebens nicht nur zu sein, sondern sich zu ihr zu verhalten.']; See also Tiedemann, *Menschenwürde als Rechtsbegriff* (2010) 244 [on Robert Spaemann: 'Personen *sind* nicht ihre Eigenschaften, sondern sie *haben* ihre Eigenschaften.']
[1756] BVerfGE 115, 118 (152) ['Sie kann keinem Menschen genommen werden.']

permits the logical assumption that 'something missing' is also an essential – that is, ontological – feature of law's *Menschenbild*. The FCC moved on to note:

> What can be violated, however, is the claim to respect which results from it [cited cases omitted].[1757]

The distinction between the fact and the law of human dignity is elucidated: while the former cannot be violated, the latter can be infringed on. The law of human dignity gives rise to a claim to respect on account of the inviolability of human dignity. An ontological approach to the relation between the fact and the law of human dignity as portrayed in the *Aviation Security Act Case* and the *Objektformel* doctrine shows how the claim to respect *per se* is key to the practice of the law of human dignity in a manner attuned to the concept's ontological meaning, to wit the unforced traversal of limits in coming-into-being. The claim to respect is an expression of self-determination and an affirmation of the nexus between the humanism and the pragmatism of law; besides instituting an inscription, the law of human dignity under Art. 1 sec. 1 GG enables making something of that inscription.

What is the hermeneutic and literary impact of doctrinally upholding the distinction between the fact and the legal claim? The ontological analysis initiates critical reflection on the distinction and on the Court's explicit opting for the authority of the fact over law's perspective in view of the insight that law constitutes a cloak of force transforming perspective into being. How does the ontological account of the law of human dignity elucidate the terms of the interplay?

iii. *Ad hoc* determination: building cases of verification through *polemos*

The state should not violate 'the ban on the disregard of human dignity'[1758]. The duty to protect entails furthermore the promotion of the life of every individual, 'which means above all to also protect it from unlawful attacks, and interference, by third parties'[1759] in accordance with Art. 1 sec. 1 sent. 2 GG. Ontologically conceived, the prohibition of state action against the life of the human being in light of the guarantee of human dignity means forbidding the external, forceful 'happening of the irruption' in coming-into-being.[1760]

[1757] BVerfGE 115, 118 (152)
[1758] BVerfGE 115, 118 (152)
[1759] BVerfGE 115, 118 (152)
[1760] Heidegger, *Introduction to Metaphysics*, 149

> What this duty means, in concrete terms, for state action cannot be definitely determined once and for all. […] such a treatment [that is, the lack of respect for human dignity] […] must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise [cited cases omitted].[1761]

Attention is drawn first to the requirement of *ad hoc* determination of what the duty ensuing from the law of human dignity means and, second, to the need to identify and concretely state the specifics of treatment interfering with the constitutional guarantee of human dignity. The need for *ad hoc* determination of human dignity meaning corresponds to the open-endedness of the question of who the human being is within the realm of law, and stresses that responses to that question should never be deemed *a priori* self-evident. If subjects of fundamental rights are 'surplus names'[1762] setting stages of dissensus, then practicing the law of human dignity mantles each concrete instance of *polemos,* due to the sweeping effect of human dignity language, as a cloak that, instead of imposing a single ontology, conversely, enables diverse, unique manifestations of human being-ness in law's practice. At the same time, in line with Presocratic philosophy, 'something missing' or the concealed as an ontological quality of human being-ness guarantees the essential space for the unique imprint of human beings on law's *Menschenbild* and their presence within the realm of fundamental rights. The explicit adumbration of how concrete affronts to human dignity feature in the *Aviation Security Act Case* is discussed extensively in the linguistic-analytical analysis, *infra*.

> Art. 1 sec. 1 GG protects the individual human being not only against humiliation, branding, persecution, outlawing, and similar actions by third parties or by the state itself [cited cases omitted]. Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, […] the obligation to respect and protect human dignity generally precludes making a human being a mere object of the state [cited cases omitted]. What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity [cited cases omitted] by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person [cited cases omitted].[1763]

[1761] BVerfGE 115, 118 (153)
[1762] Rancière, *Dissensus* (2010) 68
[1763] BVerfGE 115, 118 (153)

Besides motifs of actual harm, such as 'humiliation, branding, persecution, outlawing'[1764], in the portrayal of violations of human dignity by the state or third parties, the underlying pattern to all affronts to human dignity is that they render the human being a mere object of state action. Exercising self-determination 'in freedom' and freely developing oneself in coming-into-being and revealing one's essence are part of the *φύσις* of human beings. Not only the event of actual objectification, but also 'fundamentally calling into question' the quality of the human being as subject and 'his or her legal status as a legal entity' constitute affronts to the constitutional guarantee of human dignity in that they challenge the essentials of the depiction of law's *Menschenbild* and the ontologically perceived space reserved for legal subjects as surplus names within the realm of law. [1765]

The constitutional complaint premised on Art. 1 sec. 1 GG and Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 19 sec. 2 GG directly challenged § 14 sec. 3 LuftSiG, the statutory provision permitting the state to intentionally attack an aircraft with persons on board who have become victims of the perpetrators of the crime. On those constitutional grounds, the complainants built a case of verification availing themselves of their status as legal subjects simply by virtue of being human. Through the thereby provoked dissensus, the inscription comprehended in the law of human dignity and the fundamental right to life was subject to verification. The portrayal of law's *Menschenbild* in the practice of the law of human dignity in the *Aviation Security Act Case* centers on the juxtaposition of subject- and object-quality. Dissensus as a process of verification results in the delineation of 'the world in which those rights are valid, together with the world in which they are not.'[1766] The admissibility of the constitutional complaint was established by reason of the direct violation of fundamental rights, namely the attack on the bare life of the complainants.[1767]

What are the effects of state action by means of direct force against an aircraft in accordance with § 14 sec. 3 LuftSiG? Minding the attack would 'practically always

[1764] BVerfGE 115, 118 (153)
[1765] See BVerfGE 115, 118 (158f.) [under (3)]
[1766] Rancière, *Dissensus* (2010) 69
[1767] BVerfGE 115, 118 (126) ['The constitutional complaint is admissible. The complainants' fundamental rights are directly violated by the challenged regulation. Because they frequently use planes for private and professional reasons, the possibility that they could be affected by a measure pursuant to § 14.3 LuftSiG it is not merely a theoretical one.']; ibid (137) ['Pursuant to these principles, the complainants are entitled to lodge the constitutional complaint. They have credibly stated that they frequently use civil aircraft for private and professional reasons.']

result in its crash'[1768], what is *enjeu* from an ontological perspective is the survival of human beings on board.[1769] The forceful happening of the irruption of Being in the *Aviation Security Act Case* evokes *ex negativo* the human being-ness of the passengers and crew on board and *in concreto* infringes on the law of human dignity in that the possibility of any further movement to and fro between concealing and revealing one's essence is excluded. That the innocent persons on board the aircraft are 'doomed anyway' does not influence the decision on the constitutionality of § 14 sec. 3 LuftSiG[1770], argued the Court. The state infringes on the right to human dignity when it attacks and kills innocent people in despair. Under the contested statute the innocent on board are not only denied protection by the state, but also exposed to encroachment upon their lives while defenseless.[1771]

> Thus any procedure pursuant to § 14 sec. 3 LuftSiG disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Art. 1 sec. 1 GG and disregards the ban on killing that results from it for the state. The fact that this procedure is intended to serve to protect and preserve other people's lives does not alter this. [1772]

Through the independent evaluation and juxtaposition of the case of those on board the aircraft on the one hand and those on the ground on the other, the Court attempted to demonstrate why only in the former case state action challenges the status of innocent human beings as legal subjects, namely Art. 1 sec. 1 GG. Innocent persons on board a hijacked aircraft find themselves before a fatal deadlock, 'a situation that is hopeless for them'[1773], and, therefore, experience despair. The violation of their human dignity by the state can be rendered, in ontological terms, as *polemos*. The *polemos* unveils human being-ness; who the human being is comes forth into the unhidden. Shooting down the aircraft is tantamount to the forceful deprivation of human being-ness. Human being-ness is portrayed *ex negativo* in both its physical and psychical dimension since respectively state action causes the innocent human being on board to die and the experience of deadlock enkindles despair. The operations prescribed in § 14 sec. 3 LuftSiG in the case of an aircraft

[1768] BVerfGE 115, 118 (140)
[1769] BVerfGE 115, 118 (140) ['The consequence of the crash, in turn, will with near certainty be the death, and consequently the destruction of the lives, of all people on board the aircraft.']
[1770] BVerfGE 115, 118 (158)
[1771] BVerfGE 115, 118 (160)
[1772] BVerfGE 115, 118 (160)
[1773] BVerfGE 115, 118 (157)

with innocent persons on board do not comply with law's meta-dimension understood as law's humanism. Even if refraining from shooting down the aircraft seems from a third viewpoint a symbolic action, since the passengers and crew are anyway doomed, it however signifies, according to another reading of the Court's view, the stance of 'meditating and caring, that human beings be human and not inhumane, "inhuman", that is, outside their essence.'[1774]

b. Linguistic-analytical

The linguistic-analytical analysis draws an analogy between tautology in Wittgenstein's *Tractatus* and the notion of inviolability, which will then be reinforced by reference to the concept of morality in Levinas' *Totality and Infinity*, and presents how the *Objektformel* can be viewed as a tool of critical reflection in light of the Wittgensteinian ladder metaphor. Imponderabilities of circumstances in the *Aviation Security Act Case* can be signified as 'something missing' and dealing with those causes the boundaries of the legal language game to fluctuate.

i. Tautology and inviolability, the *Objektformel* in light of the ladder metaphor

The proposition of the inviolability [*Unantastbarkeit*] of human dignity in Art. 1 sec. 1 GG is, according to Dreier, prescriptive rather than descriptive.[1775] This is so, explains Dreier, first of all because legal texts by definition can only make normative statements. Expansion of the sense and meaning of Art. 1 sec. 1 GG ensues from the fact of the manifold violation [*Antastung*] of human dignity.[1776] However, Art. 1 sec. 1 sent. 1 GG can be seen as promulgating, with the vigor of a constitutional provision, that non-respect for human dignity does not affect the integrity of the involved human being.[1777] The vulnerable, 'the tortured, the outlaws, the persecuted' [1778], do not lose their human dignity. The FCC has combined both facets of the meaning of Art. 1 sec. 1 GG in its jurisprudence, stating that, while human beings cannot be deprived of

[1774] Heidegger, 'Letter on Humanism' 239, 244
[1775] Dreier, Art. 1 Abs. 1, *GG Kommentar* (2004) para 131 [Dreier concurs with the dominant view in legal literature]; See also Giese, *Das Würde-Konzept* (1975) 46; Krawietz (1977) 245, 255f.; Müller-Dietz (1994) 8; Hofmann, 'Die versprochene Menschenwürde' (1995) 104, 111 fn 36; Rolf Gröschner & Oliver W. Lembcke (eds), *Das Dogma der Unantastbarkeit. Eine Auseinandersetzung mit dem Absolutheitsanspruch der Würde* (1st edn, Tübingen: Mohr Siebeck, 2010); Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 33
[1776] Dreier ibid
[1777] ibid
[1778] ibid

their human dignity, their claim to respect springing from the guarantee can be violated.[1779]

What follows from the inviolability of human dignity is the absolute prohibition of balancing [*ausnahmslose Unabwägbarkeit*][1780]. 'The scope of guarantee and the limits of violation of the dignity norm are identical.'[1781] Every infringement on human dignity amounts to a violation of the provision under Art. 1 sec. 1 GG and there is no room for the usual distinction between the protective scope of and restrictions on fundamental rights [*Grundrechtsschranken*].[1782] Conflicts with the fundamental rights of others, human beings or legal entities such as animals or the environment (Art. 20a GG) cannot justify 'touching on' [*Antastung*] human dignity.[1783] Human dignity v. human dignity conflicts challenge the expansion of the absolute prohibition of balancing on all conceivable cases of human dignity violations[1784]; when an infringement on the human dignity of one legal subject shall or must take place for the human dignity of another to be guaranteed the question arises how this conflict should be treated. Such conflicts are either simply denied or declared unsuitable for justifying a violation of human dignity.[1785] Before such constellations, the notion of justifiable conflict of duties should not be excluded *a priori*.[1786]

The practice of the law of human dignity, framed as a tautological proposition of inviolability, deviates radically from the balancing model of the argumentation process of fundamental rights because Art. 1 sec. 1 sent. 1 GG puts forward an absolute validity claim.[1787] As noted *supra*, the *Objektformel*[1788] can be understood to serve the practice of the law of human dignity as a tool of critical reflection that materializes the possibility of objectification at the level of language and meaning within the legal language game emanating from a viewpoint formed by Art. 1 sec. 1

[1779] See BVerfGE 87, 209 (228) (1992) [*Tanz der Teufel*]; See also Winfried Brugger, *Menschenwürde, Menschenrechte, Grundrechte* (1997) 35
[1780] Dreier ibid para 132
[1781] Geddert-Steinacher (1990) 83
[1782] Dreier (n 1775); Kunig, Art. 1, *GG Kommentar* (2012) para 26
[1783] Dreier ibid
[1784] ibid para 133
[1785] ibid; ibid para 133 fn 434-35 [further references]
[1786] ibid para 133
[1787] Höfling, 'Die Unantastbarkeit der Menschenwürde' (1995) 857, 862; Cf. Poscher (2009) *JZ* 269, 274 ['Wenn die Rechtsprechung zum Kernbeichschutz zeigt, dass der Schutz der Menschenwürdegarantie der Abwägung mit Sicherheitsinteressen zugänglich ist, wird unverständlich, warum eine solche Abwägung im Fall des Luftsicherheitsgesetzes und der Folter grundsätzlich ausgeschlossen sein soll']
[1788] BVerfGE 115, 118 (153)

GG, only in order to, indeed artificially, open up a space of dissensus, an intersubjective space, and set in motion a process of critical reflection. The *Objektformel* breaks the tautology of inviolability, and objectification language triggers the confrontation with reality, indeed a reality of human dignity violations.[1789] As a tool of critical reflection, the *Objektformel* can be interpreted by analogy with the ladder metaphor; as language within the legal language game, it does not constitute meaning as a *status quo.* Once the reflexive purpose this formula serves is fulfilled, it shall be discarded. The *Objektformel* is more extensively discussed *infra,* in the phenomenological analysis of the text of the *Aviation Security Act Case.*

ii. Imponderabilities: the interplay between life and law or between the field of sight and the legal language game and recourse to other viewpoints

In an effort to portray the circumstances giving rise to the application of the statute, the Court emphasized and dramaturgically plotted the aerial incident and conceivable parameters influencing the outcome and, accordingly, the reaction on the part of the state mechanism. In doing so, the Court assumed and depicted the viewpoint of metaphysical subjects, that is, human beings, involved; the crucial questions for present purposes are how the Court presented those viewpoints within the legal language game and whether it made the effort to establish the soundness of the assumptions. The experience of deadlock in the following excerpt is associated with hopelessness.

> Even if in the area of police power, insecurities concerning forecasts often cannot be completely avoided, it is absolutely inconceivable under the applicability of Art. 1 sec. 1 GG to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorisation which even accepts such imponderabilities if necessary. [1790]
>
> In such cases [only perpetrators on board], it is therefore easier to ascertain with sufficient reliability and also in a timely manner that an aircraft is intended to be abused as a weapon for a targeted crash.[1791]

[1789] By analogy with the remark on whether we have delivered on our promises as regards gender equality in Baer, 'Triangle' (2009) *University of Toronto Law Journal* 417 at 425, fn. 11
[1790] BVerfGE 115, 118 (157)
[1791] BVerfGE 115, 118 (161)

> Imponderabilities [*Unwägbarkeiten*] in this context are therefore attributable to the offenders' sphere of responsibility. [1792]

Uncertainty interferes with the soundness of the justification in the Court's legal syllogism. The circumstances of an aerial incident do not always allow for a correct assessment and 'complete picture of the factual situation'; unpredictability is a key element in the portrayal of such incidents. The possibility 'that the course of events will be such that it is no longer required to carry out the operation'[1793] cannot be foreclosed. The FCC reinforced the depiction of factual uncertainty by recourse to findings deduced from written opinions submitted in the proceedings and statements made in the oral hearing. The interplay between the legal language game and the broader field of sight can be portrayed as an enlargement of the scope of surveyance and, consequently, a fluctuation of the boundaries of the former. The Court demonstrated an effort to inquire into the assumed viewpoints of those directly affected in such incidents; these are mirrored in the text of the *Aviation Security Act Case*. The Cockpit Association, for instance, noticed that the ascertainment of requirements for establishing a major aerial incident as in the contested statute 'is already fraught with great uncertainties.'[1794]

> The critical point in the assessment of the situation was said to be to what extent the possibly affected crew of the plane was still able to communicate the attempt at, or the success of, hijacking an aircraft to the decision-makers on the ground. If this was not possible, the factual basis was said to be tainted with the stigma of a misinterpretation from the very beginning.[1795]

Employment of such language as the 'stigma of misinterpretation', the 'vague' character of findings 'gained from reconnaissance measures and checks', the 'speculative to the very end' assessment of 'the motivation and objectives of the hijackers of an aircraft' is illustrative of ambiguity and controversy as integral aspects of the factual situation dealt with in the contested statute.[1796]

> […] the danger concerning the application of § 14 sec. 3 LuftSiG was said to be that the order to shoot down the aircraft was made too early on an uncertain factual basis if, within the time slot available, which as a general rule is extremely narrow, armed force

[1792] BVerfGE 115, 118 (162)
[1793] BVerfGE 115, 118 (154f.)
[1794] BVerfGE 115, 118 (155)
[1795] BVerfGE 115, 118 (155)
[1796] BVerfGE 115, 118 (155)

> was at all supposed to be used in a timely manner with prospects of success and without disproportionately endangering people who are not participants in the crime [*unbeteiligter Dritter*]. [1797]

The decisiveness of the influence of pragmatic considerations on the meaning produced in the Court's legal language game is plain to see. The uncertainty of the factual basis paired with the limited available time render the proportionality of the use of armed force questionable. In assessing the effectiveness of such a mission, one would necessarily have to accept 'from the very beginning that the operation was possibly not required at all.'[1798] The Court, reacting to the likelihood of an intervention that would prove unnecessary, brought forth the assumed viewpoint of the populace: 'reactions would probably often have to be excessive.'[1799]

The viewpoint of the Independent Flight Attendant Organization UFO was also introduced into the legal language game of the *Aviation Security Act Case*. Uncertainty features as a central theme in the respective field of sight; the 'complicated and error-prone channels of communication'[1800] between cabin crew and cockpit on board on the one hand, and the cockpit and the ground on the other, paired with the unpredictability of the evolution of events on board the aircraft, render the reliable assessment of subsumption of the facts under the contested statutory provision 'practically impossible'[1801]. Those on the ground 'who must decide under extreme time pressure'[1802] how to react, would have to do so 'on the basis of a suspicion only and not on the basis of established facts.'[1803]

Language games originating in other viewpoints and incorporated into the legal language game become aligned with the viewpoint of the Court; the eye of the judge looking through the lens of the Basic Law filters and reflects on the propositions emanating from other eyes within the field of sight. Affirming the persuasiveness of insights derived from such other viewpoints, the Court added, 'the complicated, multi-tiered decision-making system, which depends on a large number of decision-makers and persons concerned […] will require considerable time in the case of an emergency.'[1804] The relatively small overflight area of Germany

[1797] BVerfGE 115, 118 (155f.)
[1798] BVerfGE 115, 118 (156)
[1799] BVerfGE 115, 118 (156)
[1800] BVerfGE 115, 118 (156)
[1801] BVerfGE 115, 118 (156)
[1802] BVerfGE 115, 118 (156)
[1803] BVerfGE 115, 118 (156)
[1804] BVerfGE 115, 118 (156)

accelerates 'the time pressure on decision-making but also the danger of premature decisions.'[1805]

How did the FCC as the eye, the speaking self and author of the decision address imponderabilities, uncertainty and unforeseeability causing the embarrassment of the decision-making system when encountering this emergency situation? To regain authority over meaning, the FCC used the figure of spheres of responsibility[1806]. It thus tackled complications arising within the realm of life in such cases of emergency at the legal level. A sphere of responsibility is a conceptual artifact, that is, a constructed means to the solution of the problem at hand. Such spheres delineate spaces within which imponderabilities are attributable to an actor and, in that sense, manageable by the Court. The Court thereby attempted to grasp and integrate into the legal language game circumstances escaping its hold at the level of life.

iii. Portrayal of other viewpoints within the legal language game

To rebut the argument that 'the persons who are on board a plane that is intended to be used against other people's lives within the meaning of § 14 sec. 3 LuftSiG are doomed anyway […]'[1807] the FCC concentrated exclusively on the viewpoint of passengers and crew on board the hijacked aircraft, the 'innocent people in a situation that is desperate for them which an operation performed pursuant to this provisions as a general rule involves.'[1808] The motif of despair, a pervasive theme in the literary portrayal of human dignity violations, features centrally in the field of sight originating in that viewpoint. The law of human dignity as the critical lens before the eye of the judge guarantees the precedence of the viewpoint of metaphysical subjects over seemingly common sense conveyed in the estimation that they are doomed in any case. In other words, the practice of the law of human dignity centers on the human factor. Metaphysical subjects and their viewpoint and field of

[1805] BVerfGE 115, 118 (156)
[1806] BVerfGE 115, 118 (162)
[1807] BVerfGE 115, 118 (158); ibid ['In addition, uncertainties as regards the factual situation exist here as well. These uncertainties […] influence a prediction of how long people who are on board a plane which has been converted into an assault weapon will live and whether there is still a chance of rescuing them. As a general rule, it will therefore not be possible to make a reliable statement about these people's lives being "lost anyway already".']
[1808] BVerfGE 115, 118 (158)

sight, as mirrored in the legal language game of the FCC, are, in light of human dignity, respected and protected first and foremost in linguistic-analytical terms.

Linguistic-analytical practice is the elemental layer of each instance of law's practice. In the *Aviation Security Act Case*, the focus on the viewpoint of metaphysical subjects and their world is manifested most potently in the divergent treatment of the innocent on board the aircraft and the perpetrators. The FCC argued that if the only passengers on board are the criminals, then the aircraft could be shot down pursuant to § 14 sec. 3 LuftSiG. The notion of uncertainty surfaces once again in the Court's argumentation, yet, as argued, uncertainties in the assessment of the factual basis do not interfere with the constitutionality of shooting down the hijacked aircraft when only criminals are aboard. How is the viewpoint of the perpetrators is taken into consideration, thus respected, in deciding whether to shoot down the aircraft? The perpetrators have authority over the meaning produced within their field of sight; they can avert the danger and communicate their willingness to do so to those on the ground. Self-determination precipitates self-responsibility. The Court treats the perpetrators as self-responsible actors and defers to their viewpoint and the reasonably assumed meaning derived from their actions. Therein lies the 'easier' ascertainment 'with sufficient reliability and also in a timely manner' of the intention to abuse the aircraft 'as a weapon for a targeted crash'.[1809]

The FCC did not practice the law of human dignity in responding to human beings on the ground, 'against whose lives the aircraft that is abused as a weapon for a crime within the meaning of § 14 sec. 3 LuftSiG is intended to be used.'[1810] The duty of the state to protect those on the ground, argued the Court, cannot justify state action pursuant to § 14 sec. 3 LuftSiG if there are innocent human beings on board the aircraft. In linguistic-analytical terms, the Court referred to the perspective of those on the ground but did not subsume it under the legal language game that originates in the viewpoint formed by looking particularly through the law of human dignity as the decisive lens. Addressing, however, their perspective causes a fluctuation of the boundaries of the human dignity legal language game in that these expand to treat the circumstances of those on the ground and contracts when they excludes them from the scope of protection pursuant to Art. 1 sec. 1 GG.[1811]

[1809] BVerfGE 115, 118 (161)
[1810] BVerfGE 115, 118 (162ff.)
[1811] BVerfGE 115, 118 (164)

c. Phenomenological

The phenomenological portrayal reflects the dual sense of 'something missing', discussed on occasion of the distinction between the fact and the law of human dignity. Notions such as morality and sacrifice are associated respectively with human dignity and the transcendental. The principle of proportionality is perceived as an appeal to intersubjective space within the totality of legal language games.

i. The law of human dignity: on the borderline between fact and law, the dual sense of 'something missing'

The major premise of the Court's syllogism in the *Aviation Security Act Case* is composed of the fundamental right to life under Art. 2 sec. 2 sent. 1 GG, which is 'subject to the requirement of the specific enactment of a statute pursuant to Art. 2 sec. 2 sent. 3 GG […]', and the guarantee of human dignity under Art. 1 sec. 1 GG 'which is closely linked with it.'[1812] The statute that restricts the fundamental right to life must be regarded in light of Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 GG. The Court stated that '[h]uman life is the vital basis of human dignity as the essential constitutive principle, and as the supreme value, of the constitution […].'[1813]

> [...] this dignity [...] cannot be taken away from any human being. What can be violated, however, is the claim to respect which results from it [cited case omitted]. This applies irrespective [*unabhängig von*], *inter alia*, of the probable duration of the individual human life (see BVerfGE 30, 173 (194)[1814] on the human being's claim to respect of his or her dignity even after death).[1815]

The phrases 'all human beings' and 'irrespective of' convey infinite emptiness as an aspect of the meaning of law's *Menschenbild* perceived in light of the inherent dignity of human beings.[1816] The second appearance of the phrase 'irrespective of' establishes that, due to the absolute character of human dignity, individual human life cannot be quantified[1817]. The *supra* excerpt refers to the dual sense of 'something

[1812] BVerfGE 115, 118 (152)
[1813] BVerfGE 115, 118 (152) [Citing: BVerfGE 39, 1 (42); 72, 105 (115) (1986) [*Life Imprisonment*]; 109, 279 (311) (2004) [*Großer Lauschangriff*]]
[1814] BVerfGE 30, 173 (1971) [*Mephisto*]
[1815] BVerfGE 115, 118 (152)
[1816] It is plain to see that *Leistungstheorie*-conceptions are unequivocally rejected.
[1817] See however an enhancement of the relation of the law of human dignity and the fundamental right to life in Hufen (2004) 313, 317 [violations of human life are not necessarily at the same time violations of human dignity]; See also Edzard Schmidt-Jortzig, 'Systematische Bedingungen der

missing'. 'Something always missing' alludes to infinity as an aspect of the relational meaning of human being-ness; the other is absolutely Other. 'Something missing' as a *Leerstelle* describes the space reserved within legal language games, that is, totalities produced in practicing the law, for the human being-ness of the other, who is portrayed *ad hoc* from the first-person point of view, to eventuate within them. The concrete meaning of the duty of the state to respect and protect human dignity under Art. 1 sec. 2 GG 'cannot be definitely determined once and for all […].'[1818] The dual sense of 'something missing' in the phenomenological depiction of the practice of the law of human dignity enables the welcoming of the other as absolutely Other. This space is offered to the other as a concrete and unique face; the infinitely unique imprints of who the other is materialize through the face-to-face encounter and may be deduced *ad hoc* from the context of the *Leerstelle*.

Human beings cannot be deprived of the dignity they 'possess'. Only the claim to respect the human dignity of individuals can be violated. What does the distinction between human dignity and the claim to human dignity suggest? The proposition of the inviolability of inherent human dignity declares a fact; the claim to respect and protection guaranteed in law is premised on a legal norm. The fact that all human beings possess human dignity by virtue of being human brings to mind the notion of morality as elaborated on in *Totality and Infinity*. The tautological schema intimates the notion of the limit and the meta-level beyond it. The legal norm guaranteeing a claim to respect for and protection of human dignity or, as presently put, the law of human dignity may be portrayed as a totality structure. Only a totality can be infringed on; totalities are presupposed by war.

By analogy with the concept of war in *Totality and Infinity,* violations of the claim to respect human dignity as grounds for negative definitions – a time-honored doctrinal discussion in Germany – can be revisited and perceived as *ex negativo* signifiers of the infinity of human being-ness. The portrayal of violations as war points to infinity as the other side of the totality story. As Levinas observes, '[v]iolence bears upon only a being both graspable and escaping every hold.'[1819] The infinity of human being-ness can be sensed in the occurrence of violence, in war. It should be born in mind that this remark concerns merely a pattern of hermeneutic and

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Garantie unbedingten Schutzes der Menschenwürde in Art. 1 GG – unter besonderer Berücksichtigung der Probleme am Anfang des Lebens' (2001) *DÖV* 925, 926

[1818] BVerfGE 115, 118 (153)

[1819] Levinas, *Totality and Infinity*, 223

literary depiction of infinity; the humane practice of law is set side by side with the unforced manifestation of infinity.

> In war reality rends the words and images that dissimulate it, to obtrude in its nudity and in its harshness. Harsh reality (this sounds like a pleonasm!), harsh object-lesson, at the very moment of its fulguration when the drapings of illusion burn war is produced as the pure experience of pure being.[1820]

Violations of human dignity generate images of the inhumane, while, at the same time, alluding to the meaning of the humane. The 'gut-feeling' suggests the poetic sensing of the infinity of human being-ness and, consequently, of the law of human dignity on occasion of assaults on human dignity. Poetics are intimated in that meaning arises from images – such as the *Menschenbild* – and figurative representations. All that can be sensed, according to Levinas, through poetics is our separation from the Other, 'something always missing'.

ii. The *Objektformel*: portraying breaking with the inviolability of human dignity only to guarantee it

Prior to embarking on the analysis of the practice of the *Objektformel* doctrine in the *Aviation Security Act Case*, it bears noting again that the state has essentially an institutional and a personal dimension. For purposes of intelligibility of the argument put forward, let us first zoom in on the institutional aspect of the state. Can the constitutional state, that is, an institution constituted on the – prescriptive as per dominant opinion – proposition of inviolability and assuming the respect and protection of human dignity, produce language – and meaning – implying that it could, as self, objectify the other? If constitutional law is the decisive lens through which the state looks at the world to produce meaning, how is the possibility of objectifying the other even conceivable? Can this constitutional self speak, articulate and share a world using language that contradicts the morality it panegyrizes?

The questions raised and the overall economy of the analysis require, first, a linguistic-analytical approach to the practice of the *Objektformel* and only on the basis of observations deduced therefrom, a phenomenological analysis. Consistently with the all-permeating validity of the law of human dignity[1821] as the critical lens for

[1820] ibid 21

[1821] The tautological pattern of the proposition of inviolability ['*Unantastbarkeit'*] corresponds and accounts for the all-permeating validity of the law of human dignity. Wittgenstein notes, in

looking at the world, objectification language cannot be found within the boundaries of legal language games. The paradox consists in the appearance of objectification language in the sharing of a world, namely the order of the Basic Law that originates in the inviolability of human dignity, despite the fact that the viewpoint of any expression of the German constitutional state, looking through the lens of the Basic Law in producing meaning, lacks the means to generate objectification language. Merely the phrase '[r]endering the human being a mere object of state action' materializes objectification at the level of language.

What might the presence of objectification language then mean? First, minding that the lens of the Basic Law *per se* forecloses the practice of such language, who accounts for practicing the *Objektformel* doctrine? More elementally than the obvious assertion that the *Objektformel* constitutes legal doctrine, thus is evidently attributed to authors, the presence of objectification language within legal language games produced by state actors witnesses *reductio ad absurdum* the eye, the metaphysical subject or human factor[1822]. The responsibility for practicing objectification language is credited to the human factor traced in the speaking self, at the same time an institution and a human being. The world actually articulated and shared exceeds the linguistic and semantic possibilities provided by the lens of the Basic Law and particularly the law of human dignity. Awareness of the paradox in the portrayal – at least on first reading – begs a further question, namely why the constitutional judge as the speaking self[1823], in practicing the law of human dignity, employs objectification language.

These remarks about the implications of the *Objektformel* at the level of language enhance an understanding of this doctrine as a tool of critical reflection that stirs real conversation, reinterpreation[1824], the shaking of the certainty nurtured by the tautological form of the inviolability proposition to create anew an intersubjective space[1825]. The proposition that Art. 1 sec. 1 GG 'precludes making a human being a mere object of the state' spells out what the law of human dignity exorcises, and

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Wittgenstein, *Tractatus*, (4.463) '[…] Tautology leaves to reality the whole infinite logical space; […].'

[1822] This does not mean that the institutional component of state actors cannot be the source of violations of human dignity, see Margalit, *The Decent Society* (1996) 1 [institutional humiliation]

[1823] Focusing on the constitutional judge serves the purposes of an analysis tailored to the text under scrutiny; granted, objectification language is practiced in doctrinal discourse among legal scholars.

[1824] Levinas (n 1819) 13 [Introduction by John Wild]

[1825] Levinas, ibid 290; See also Gadamer, *Truth and Method* (1975, 2004) 390 ['fusion of horizons']

thereby forces once again the face-to-face encounter with the other and listening and learning from the other's lived experience[1826] to verify the humane practice of the law. Objectification has undeniably phenomenological meaning. The distinction between the fact and the law of human dignity elucidates how a human being can be rendered a mere object of state action or the action of third parties, namely can be subsumed under the gaze of someone who exercises authority over meaning from the first-person point of view. The *Objektformel* points directly to the human factor underling institutions.

The reasons rendering a confrontation with the possibility of objectification necessary in the German context could be sought in history, specifically the historical background of National Socialism, and sociological and psychological research. The hermeneutic and literary lens applied here does not ignore the importance of approaches within other disciplines; rather, it engages in a portrayal of considerations arising from the presence of objectification language to advance another understanding of the *Objektformel* that serves – in line with phenomenological insights in Chapter One – the humane practice of the law of human dignity. The *Objektformel*[1827] is a tool of critical reflection, instituted doctrinally, namely as a totality structure. This doctrine declares the existence of the human factor as a facet of institutions, and articulates and depicts violations of human dignity, thus triggering questions in a process of critical reflection.

In linguistic-analytical terms, sharing a world within which the risk of objectification becomes a fact, namely is embodied in a proposition, breaks with the tautology of the inviolability of human dignity[1828], thus allowing engagement with reality, an inclination of infinitizers in *Totality and Infinity*[1829]. Inquiry into the meaning of the *Objektformel* in the practice of the law of human dignity shows that legal actors, here the FCC and legal scholars developing this doctrinal formula, can construct and institute tools that crack even those totality structures providing for law's meta-dimension. The reality check provoked by objectification language guarantees the humane practice of the law of human dignity by ensuring the sound justification, that is, responsible practice, of the tautological proposition; from a

[1826] Levinas, ibid 16 [Introduction by John Wild] ['The basic difference is between a mode of thought which tries to gather all things around the mind, or self, of the thinker, and an externally oriented mode which attempts to penetrate into what is radically other than the mind that is thinking it.']
[1827] Starck (1981) 457, 459f.
[1828] Wittgenstein, *Tractatus*, (4.462), (4.463), (4.464)
[1829] Levinas, *Totality and Infinity,* 17 [Introduction by John Wild]

phenomenological perspective, the employment of the *Objektformel* enables the verification that a response reflects the ability to respond. The *Objektformel* doctrine artificially raises a challenge for those practicing the law to demonstrate that they have responsibly surveyed, listened and learned from lived experience, and responded to the other.

In linguistic-analytical terms, the employment of the *Objektformel* can be viewed as a *sui generis* Wittgensteinian ladder. Instead of constructively guiding us in ascending to the meaning of the practice of human dignity, it generates an image of the deconstruction of human dignity, that is, the objectification of the other. The image triggers further reflection and scrutiny. Once the reflection required to reach an understanding of the *ad hoc* instance of practicing human dignity is demonstrated, this ladder can be discarded.[1830] Unless discarded, objectification, both the language and the doctrine, may become a *status quo* within the legal language game, thus part of the world shared by the self in generosity. Unless discarded, objectification language results in portrayals of the state as a totalizer self and of the other as no longer absolutely other in accordance with Art. 1 sec. 1 GG. At the level of language, not throwing away the ladder, not discarding the totality structure of the *Objektformel* doctrine after ascending, would force the signification of human beings as either subjects or objects and, thus, cause the reduction of language directly invoking human being-ness[1831]; consequently, the linguistic and semantic hook for identifying the practice of law's meta-dimension, the word 'human', would falter.

The *Objektformel* doctrine in FCC jurisprudence and German legal scholarship is, from a hermeneutic and literary perspective, a tool of critical reflection employed in the practice of the law of human dignity to guarantee the responsible, that is, substantial and effective, response to the other. Mobilizing the *Objektformel* in

[1830] Wittgenstein (n 1828) (6.54)

[1831] Relational accounts of human being-ness and human dignity instituted in language preserve the humane character of practicing the law of human dignity, precisely in that it resists hinging on the subject-object distinction. To the extent that the text of judicial decisions primarily conveys real conversation between the speaking self and author of the decision and the other, namely human beings involved in the case, apropos the law of human dignity, which *per se* exists as a textual reference, and secondarily opens up an 'interpretive *dialogue*' with future readers the subject-object language can be avoided. This remark reveals the advantages of the Gadamerian perception of hermeneutics presently followed. See Hoy, *The Critical Circle* (1982) 40 ['Speaking about the intention of the text has the potential theoretical advantage of avoiding the traditional vocabulary of Cartesian philosophy of consciousness and hence the antinomies of subject-objet language. Wittgenstein's philosophy, as well as Heidegger's, has this force. Once the appeal to the consciousness of the author is eliminated, however, other questions remain, including how the intention of a text is determined by the interpreter. One answer is provided by the hermeneutic theory hermeneutic theory of Gadamer, who argues that the text takes part in an interpretive *dialogue*.']

a process of critical reflection can be seen as the act of an infinitizer. The infinitizer is motivated by desire for the other as Other.[1832] In the presently introduced relational phenomenological understanding, the *Objektformel* is not interpreted as a doctrine that totalizes; rather, the imperative of engaging in face-to-face encounter with the other is enhanced by a doctrinal tool for diagnosing the objectification of the other, despite the prescription of inviolability in Art. 1 sec. 1 GG. The 'bad willing'[1833] of the human factor within institutions accounts for such abuse.

Harm as 'humiliation, branding, persecution, outlawing'[1834], in other words 'injuring and annihilating'[1835] human beings, is not the only conceivable kind of violence. We have already distinguished between the forced and the forceful. The language used to describe violence in the legal language game of the *Aviation Security Act Case* depicts the other as vulnerable, and evokes the meaning of morality[1836] in *Totality and Infinity* and its association with the idea of human dignity as established in the phenomenological account of the law of human dignity.[1837] Another conceivable sense of violence, 'making a human being a mere object of the state' or third parties is precluded, noted the FCC, by the duty to respect and protect human dignity.[1838] Before shedding light on what this further sense of violence could mean in view of the phenomenological insights in Chapter One, it is vital to trail the syllogism preceding objectification language.

Objectification is violence against the other, an interruption of the continuity of human beings, 'making them play roles in which they no longer recognize themselves, making them betray not only commitments but their own substance,

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[1832] Levinas, *Totality and Infinity*, 33
[1833] Wittgenstein (n 1828) (4.23), (4.3)
[1834] BVerfGE 115, 118 (153)
[1835] Levinas (n 1829) 21
[1836] ibid 245
[1837] BVerfGE 115, 118 (153) ['Art. 1 sec. 1 GG protects the individual human being not only against humiliation, branding, persecution, outlawing and similar actions by third parties or by the state itself [cited cases omitted].']
[1838] BVerfGE 115, 118 (153) ['Taking as a starting point the idea of the constitution-creating legislature that it is part of the nature of human beings to exercise self-determination in freedom and to freely develop themselves, and that the individual can claim, in principle, to be recognized in society as a member with equal rights and with a value of his or her own [cited case omitted], the duty to respect and protect human dignity generally precludes making a human being a mere object of the state [*den Menschen zum bloßen Objekt des Staates zu machen*] [cited cases omitted]. What is thus absolutely prohibited is any treatment of a human being by public authority which fundamentally calls into question his or her quality of a subject, his or her status as a legal entity [cited cases omitted] by its lack of the respect of the value which is due to every human being for his or her own sake, by virtue of his or her being a person [cited cases omitted].']

making them carry out actions that will destroy every possibility of action.'[1839] This understanding of violence brings to mind the experience of deadlock signaling the impairment of self-determination. The other is subsumed under a totality from which there is no escape. Objectification language vividly evokes the betrayal of human being-ness, of human beings' 'own substance' within the realm of law, namely their legal subject status. This, however, also stands as an ontological remark. What would, then, a distinctly phenomenological reading be? The relational phenomenological approach is premised on the *supra* discussion about the danger of objectification at the level of language and sharpens overall the appreciation of the meaning of the *Objektformel* in the practice of the law of human dignity in FCC jurisprudence.

The humanism of law lies, in accordance with Levinas' phenomenology, in the provision for the possibility of transcendence and transascendance.[1840] Unless the law of human dignity as a totality structure is perceived as the guarantee of a crack in the totality it institutes, the humane practice of that law and fundamental rights is foreclosed. Infinitizers view totality systems as the violence of a 'permanent tyranny […] which free men should resist […]'[1841], and identify the practice of language in the face-to-face encounter as the antidote to the violence of vision. The *Objektformel* doctrine, *per se* a totality structure, expresses and prohibits the subsumption of the other under a totality. What is the signification and significance of objectification language in the practice of the law of human dignity? It should not escape our attention that in the *Aviation Security Act Case* objectification language is telling of how the FCC understood and portrayed itself as the speaking self, the state as self more generally, the other, that is, human beings involved in the case, and the relation between the self and the other.

The legal norm of human dignity, a totality structure, paradoxically encompasses the infinity that can cause its rupture. The presence of the *Objektformel* in the practice of the law of human dignity engenders another paradox, which becomes visible when the fact that it constitutes *per se* language, the social, is emphasized. As language, objectification manifests the ethical choice of the speaking self to welcome the stranger[1842], while at the same time assumes, as legal doctrine, a totality structure, the systematic. Articulation as sharing precedes the systematic. The

[1839] Levinas (n 1829) 21
[1840] See also the metaphor of ascending a ladder in the *Tractatus Logico-Philosophicus* (6.54)
[1841] Levinas (n 1829) [Introduction by John Wild]
[1842] ibid 245

presently furthered argument operates first at this pre-level, aspiring to then ground an understanding of the function of the *Objektformel* within the realm of law.

iii. Human dignity as morality and the face-to-face encounter in responsibility, hospitality, generosity

The language of absolute respect for and protection of human dignity features dominantly in the practice of the concept in the *Aviation Security Act Case.* The most important implication of absoluteness is that human dignity cannot be subject to balancing, save in the case of human dignity v. human dignity conflicts. In the discussion about the applicability of the principle of proportionality, the FCC employed language that evokes themes found in *Totality and Infinity*. Drawing parallels between the text and insights derived from the work of Levinas to portray how the law of human dignity is practiced in the *Aviation Security Case* this phenomenological analysis confronts in main the following question: Who is the other apropos the Court as the speaking self in the practice of the law of human dignity? How are instantiations of the self portrayed in the text of the *Aviation Security Act Case,* and does the self-understanding of the FCC[1843] as regards how it relates to the other countersign the meaning of practicing the law of human dignity? Demonstration of the particulars of the face of the other, namely of his or her imprint on 'something missing' as an aspect of the meaning of law's *Menschenbild*, is a first step towards remedying the identified objectification.

> When it is that such a treatment occurs must be stated in concrete terms in the individual case in view of the specific situation in which a conflict can arise [cited cases omitted].[1844]

The other in the *Aviation Security Act Case* is the one who can no longer exercise self-determination, namely human beings experiencing the deadlock of no longer being able to 'influence the circumstances of their lives independently from others in a self-determined manner.'[1845] § 14 sec. 3 LuftSiG is incompatible with Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 GG 'to the extent that the shooting down of an aircraft affects people who, as its crew and passengers, have not

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[1843] Binder & Weisberg, *Literary Criticism of Law* (2000) 463 [Cultural criticism of law 'treats law as a dimension of culture insofar as it: […] [i]nterprets self-portrayal as a project that, whatever its instrumental payoffs, also has aesthetic and expressive import.']
[1844] BVerfGE 115, 118 (153)
[1845] BVerfGE 115, 118 (154)

exerted any influence on the occurrence of the non-warlike aerial incident assumed under [the statutory provision].'[1846] In such an 'extreme situation', marked 'by the cramped conditions of an aircraft in flight'[1847], the standard for assessing whether an answer on the part of the state as the self is responsible is certainty: 'it must be possible, pursuant to § 14 sec. 3 LuftSiG, to assume with certainty that the aircraft is intended to be used against human lives.'[1848]

The FCC outlined the circumstances which should be ascertained with certainty for § 14 sec. 3 LuftSiG to take effect: the aircraft 'must have been converted into an assault weapon by those who have brought it under their command […]' and 'must be used by the perpetrators in a targeted manner as a weapon for the crime, not merely as[1849] an auxiliary means for committing the crime, against the lives of people who stay in the area in which the aircraft is intended to crash […]'[1850]. The other, human beings involved in the *Aviation Security Act Case,* are the passengers and crew, the perpetrators, and the people who stay in the targeted area; they all surface in the portrayal of the minor premise in the Court's legal syllogism.

The Court depicted the 'desperate situation' experienced by the passengers and the crew 'at the moment in which the order to use direct armed force against the aircraft involved in the aerial incident pursuant to § 14 sec. 4 LuftSiG is made […]'[1851].

> The desperateness [*Ausweglosigkeit*] and inescapability [*Unentrinnbarkeit*] that characterize the situation of the people on board the aircraft who are affected as victims also exist vis-à-vis those who order and execute the shooting down of the aircraft. Due to the circumstances, which cannot be controlled by them in any way, the crew and the passengers of the plane cannot escape [*nicht ausweichen*] this state action but are defenseless and helpless in the face of it with the consequence that they are shot down in a targeted manner together with the aircraft and as result of this will be killed with near certainty. Such a treatment ignores the status of the persons affected as subjects endowed with dignity and inalienable

[1846] BVerfGE 115, 118 (153)
[1847] BVerfGE 115, 118 (154)
[1848] BVerfGE 115, 118 (153)
[1849] Hoerster distinguishes between '*bloß als Mittel' and 'als Mittel'*. Hoerster (1983) 93, 94; See also reflections on objectification in Margalit, *The Decent Society* (1996) 91 ['We must distinguish between treating humans *as if* they were objects and treating them *as objects*. In the first case the "objectifier" does not actually believe that the people involved are things but simply treats them that way. In the second case the "objectifier" actually believes that the person toward whom the "thingish" behavior is directed is a sort of object.']

[1850] BVerfGE 115, 118 (153f.)
[1851] BVerfGE 115, 118 (154f.)

> rights. By their killing being used as a means to save others, they are treated as objects and at the same time deprived of their rights; with their lives being disposed of unilaterally by the state, the persons on board the aircraft, who, as victims, are themselves in need of protection, are denied the value which is due to a human being for his or her own sake.[1852]

The language employed in practicing the law of human dignity, namely in addressing the denial of 'the value which is due to a human being for his or her own sake' to the passengers and crew on board, portrays dramatically the experience of deadlock: 'desperateness', 'inescapability', 'victims', 'cannot escape', 'defenseless', 'helpless' all communicate the harm experienced.

The deadlock renders the passengers and crew 'objects not only of the perpetrators of the crime' but also of the state, 'which in such a situation resorts to the measure provided by § 14 sec. 3 LuftSiG', thereby effectively treating them, argued the FCC, 'as mere objects of its rescue operation for the protection of others.'[1853] The hermeneutic and literary interpretation of the meaning of objectification comes in handy, along with the phenomenological foundations of the introduced model in Chapter One, for the analysis of this assertion. In one of the relational portrayals of the legal language game produced by the speaking self, namely the FCC, the other corresponds to the victims, the innocent human beings on board the aircraft, while the self to both the perpetrators of the crime and the state. The actions of the perpetrators and the state cause the disruption of the self-determination of the victims, that is, of their ability to control the circumstances.

It is plain to see that the perpetrators as the self violate the human dignity of the victims as the other. The assumption, however, that the state shooting down the aircraft 'in a targeted manner' totalizes the passengers and the crew on board, ignores their status as subjects 'endowed with dignity and inalienable rights', and objectifies and deprives them of their rights because it kills them in order to save the lives of those on the ground, begs critical reflection. Objectification, in phenomenological terms, means that the other can no longer absolve him or herself from the relation with the self with his or her integrity intact.[1854] The way of existing of human beings treated as mere objects of state action is no longer their 'final answer'.

[1852] BVerfGE 115, 118 (154)
[1853] BVerfGE 115, 118 (154)
[1854] Levinas, *Totality and* Infinity, 16 [Introduction by John Wild]

Critical reflection concentrates, from a linguistic-analytical perspective, on the portrayal of the viewpoint of the eye, while, from a phenomenological, of the self who produces meaning. It has been demonstrated *supra* how the *Objektformel* can – and should – be understood as a critical reflection mechanism. In the *Aviation Security Act Case*, the FCC found that state action in line with § 14 sec. 3 LuftSiG in the case of an aircraft carrying innocent passengers and crew amounts to the objectification of innocent passengers and crew, hence to an infringement on their human dignity. Presumably, the Court's claim that these human beings are treated as mere objects of state action is founded on the outcome of critical reflection artificially provoked by the *Objektformel* doctrine and language. Since all that can be derived from the text of the *Aviation Security Act Case* is the meaning produced, the outcome, the phenomenological approach to the self can only generate interrogatives as regards the soundness of assumptions. Deeming objectification by the state possible is attuned to the commitment to guarantee *de facto* that the claim to respect and protection of human dignity is not violated. Delivering upon this commitment means exercising the responsibility to fuel critical reflection with the findings of a reality check.

Second, state action is parallelized to the action of the terrorists[1855], not only apropos its consequences, but also – this is particularly relevant to the purposes of a phenomenological analysis – with respect to how it is perceived by the other. Can the meaning of shooting down an aircraft to avert an attack be analogized with using it as a weapon against the lives of human beings on the ground? Can, from the viewpoint of the passengers and the crew on board, an attack on the part of the state be comparable to the actions of the perpetrators? Does the FCC equate the portrayal of the state as the acting self with that of the perpetrators of the crime? From a hermeneutic perspective on law, the decisive question would be, who, the self or the other, or what, the action as such[1856], determines critically the meaning produced? It can be safely argued that in practicing the law of human dignity in the *Aviation Security Act Case* the Court does not sufficiently depict the self. Regardless of

[1855] BVerfGE 115, 118 (154) ['[…] the state itself even encroaches on the lives of these defenseless people. Thus any procedure pursuant to § 14 sec. 3 LuftSiG disregards, as has been explained, these people's positions as subjects in a manner that is incompatible with Art. 1 sec. 1 GG and disregards the ban on killing that results from it for the state.']

[1856] BVerfGE 115, 118 (157) ['[…] it is absolutely inconceivable under the applicability of Art. 1 sec. 1 GG to intentionally kill persons such as the crew and the passengers of a hijacked plane, who are in a situation that is hopeless for them, on the basis of a statutory authorization which even accepts such imponderabilities if necessary [...]'; ibid (160) [' […] the victims of an attack who are held in the aircraft are entitled to their lives being protected by the state.']

whether the self should be the determinant of meaning – a matter contingent on a methodological choice among various theoretical strands of hermeneutics – the Court's reasoning does not attend to the advancement of an understanding of who the state as self vis-à-vis the perpetrators is.

It should be noted that deferring to the viewpoint of the other for the determination of objectification is compatible with phenomenological insights derived from *Totality and Infinity*. Instead of subsuming the other under a hermetically closed totality of meaning, the Court welcomes the other, attends to the experience of deadlock and gives precedence to the viewpoint of the other as bearer of human dignity and fundamental rights over other viewpoints. This does not, however, mean that developing and demonstrating an understanding of the state, the self, should be neglected. Why does the state shoot down the aircraft? How is the motivation of the state different from that of the perpetrators, and to what extent does such disparity constitute an aspect of the meaning produced within the legal language game? What are the ethics underlying state action and the action of the perpetrators? How can the soundness of the assertion that the victims of an attack are 'denied' the value of their lives on the part of the state, although *de facto* the state cannot actually protect them under the circumstances, be appreciated? How can one deny what exceeds the bounds of possibility? The latter question suggests that the significance of the Court's reasoning in the *Aviation Security Act Case* may be the statement uttered *per se*. This realization affirms the aptness of a hermeneutic and literary methodological approach to the text of this particular case.

Far from a doctrine ostensibly comprehending all conceivable violations of human dignity, and a pretext for schematic oversimplification, the *Objektformel* doctrine presents, from a hermeneutic and literary perspective, an opportunity for the self to attain and demonstrate the ability to respond to the other[1857], while becoming aware of arbitrariness. The cultivation of responsibility, namely the ability to respond in a justifiable manner to the other, calls for critical reflection on the portrayal of the other as in the *Aviation Security Act Case*. The FCC associated 'being used as a means to save others' with being treated as an object. An interruption of the continuity of human beings, however, does not necessarily follow from their use as means to certain ends. Identifying objectification with being used as means to ends,

[1857] ibid 14 [Introduction by John Wild]; See Thurner (2001) 185

unless grounded on sound arguments and interpreted in light of context, develops the totalizing effects of oversimplification. For the association to soundly hold true, critical reflection and justification tailored to *ad hoc* cases[1858] of using human beings as means to ends are needed. The discussion of sacrifice *infra*, an occasion of becoming means to ends, offers an opportunity for enhancement of the latter argument.

The FCC rebutted, first, the assumption 'that someone boarding an aircraft as a crew member or as a passenger will presumably consent to its being shot down, and thus to his or her own killing' on the grounds that it 'lacks any realistic grounds and is no more than an unrealistic fiction'[1859]. The Court thereby identified verification grounded on realistic assertions as a standard for ascertaining whether the answer to the other is responsible. The Court furthermore rejected that 'the nature of an infringement' on the right to dignity of 'persons who are on board a plane that is intended to be used against other people's lives within the meaning of § 14 sec. 3 LuftSiG' can be removed from 'the killing of innocent people' who experience the despair involved in such an operation 'as a general rule' on account of the assessment that they 'are doomed anyway.'[1860]

The constitutional protection of human life and human dignity cannot be made contingent on a quantitative appreciation of human being-ness, in other words 'the duration of the physical existence of the individual human being'. Denying or challenging this proposition is tantamount to renouncing the victims of the attack, who find themselves 'in a desperate situation that offers no alternative to them' and are, therefore, deprived of self-determination.[1861] Not according them the respect which is due to them for the sake of their human dignity could be portrayed in light of phenomenological insights in Chapter One as the turning of the face away from the other, the forbearing from face-to-face encounter. The notion of morality as

[1858] BVerfGE 115, 118 (162) ['[…] situations are conceivable in which it can be reliably ascertained that the only people on board an aircraft which is involved in an aerial incident are offenders participating in such an incident, and in which it can also be assumed with sufficient certainty that a mission pursuant to §14 sec. 3 LuftSiG will not have consequences that are detrimental to the lives of people on the ground. Whether such a factual situation exists depends on the assessment of the situation in the individual case.']
[1859] BVerfGE 115, 118 (157)
[1860] BVerfGE 115, 118 (158) ['Human life and human dignity enjoy the same constitutional protection regardless of the duration of the physical existence of the individual human being […]. Whoever denies [*leugnet*] this or calls this into question denies those [*verwehrt denjenigen*] who, such as the victims of a hijacking, are in a desperate situation that offers no alternative to them, precisely the respect which is due to them for the sake of their human dignity […].']
[1861] BVerfGE 115, 118 (158)

elaborated on in *Totality and Infinity* gives the gist of what amounts to a responsible answer in view of the second assumption refuted by the Court, that is, quantification. Non-quantification alludes to the notion of infinity, of seeing the Other in the face of the other; denying or challenging the non-quantification contention constitutes an affront to human being-ness, hence, also, to human dignity and compromises morality, through which alone 'are I and the others produced in the universe'[1862].

Not seeing the human being in the face of the other forecloses the very possibility of language and the pre-ethics of responsibility, hospitality and generosity. This instance of practicing human dignity language can be portrayed by analogy with the concept of morality or the accomplishing of the I qua I[1863] as defined in *Totality and Infinity*. The innocent human beings on board are vulnerable, a concrete substantiation among infinite exigencies converging at one point in the universe[1864]. Prior to the legal subject, defined as such in terms of the system of law, it is the face of the vulnerable other that should be approached by the state as self in service and generosity in accordance with the relational, phenomenological account of the law of human dignity.

The Court furthermore reacted against the assumption that 'anyone who is held on board an aircraft under the command of persons who intend to use the aircraft as a weapon of a crime against other people's lives within the meaning of § 14 sec. 3 LuftSiG has become part of a weapon and must bear being treated as such […].'[1865] The language employed, on the borderline between metaphor and *le mot juste*, conjures up an evocative picture of the other totalized by the perpetrators. The figurative rendering of the totality imposed on those human beings is evident in the following excerpt.

> [...] the victims of such an incident are no longer perceived as human beings but as part of an object, a view by which they themselves become objects. This cannot be reconciled with the Basic Law's concept of the human being and with the idea of the human being as a creature whose nature it is to exercise self-determination in freedom [cited case omitted], and who therefore may not be made a mere object of state action.[1866]

[1862] Levinas, *Totality and Infinity*, 245
[1863] ibid
[1864] ibid
[1865] BVerfGE 115, 118 (158)
[1866] BVerfGE 115, 118 (158f.)

The elusive passive voice framing, 'are no longer perceived as human beings but as part of an object', effectively conceals the self who is charged with viewing the other as 'part of an object'. This observation affirms the need for critical reflection on the inadequacy or unavailability of a portrayal of the self, to wit the critical viewpoint. The prevalent phenomenological framing of the observation of causality between how the victims are perceived and how, due to exposure to the meaning produced, they become themselves objects points to the correlation between how the other is perceived and how the other consequently ends up viewing him or herself. The other is objectified, that is, totalized, and subsumed under the meaning projected on him or her. The self-understanding of the other may eventually coordinate with who or what the other is perceived to be. Where the dividing line between phenomenology and ontology is to be drawn, appears ambiguous. The phenomenologically grounded standard for evaluating whether responses amount to responsible answers to the other is respect for the self-determination of the other as an absolutely Other.

iv. Reflections on sacrifice

An idea furthered in legal scholarship[1867] drew the Court's attention, namely 'that the individual is obliged to sacrifice his or her life in the interest of the state as a whole in case of need if this is the only possible way of protecting the legally constituted body politic from attacks which are aimed at its breakdown and destruction'[1868]. The FCC argued that assuming a duty to sacrifice one's life cannot justify the state action prescribed in the contested statutory provision.

> In this context, the Senate need not decide whether, and should the occasion arise, under which circumstances such a duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution can be derived from the Basic Law. For in the area of application of § 14 sec. 3 LuftSiG the issue is not averting attacks aimed at abolishing the body politic and at eliminating the state's legal and constitutional system.[1869]

The Court shared an understanding of sacrifice as 'the duty of taking responsibility, in solidarity, over and above the mechanisms of protection provided in the emergency constitution', yet abstained from identifying the circumstances under

[1867] BVerfGE 115, 118 (159) [The FCC referred parenthetically 'for instance' to Enders, in: *Berliner Kommentar zum Grundgesetz*, vol. 1, *Artikel 1*, marginal no. 93 (as of July 2005).]
[1868] BVerfGE 115, 118 (159)
[1869] BVerfGE 115, 118 (159)

which a duty to sacrifice oneself can be derived from the Basic Law. The Court stated it 'need not' engage in further elaboration on sacrifice as an aspect of the justificatory basis of state action in line with § 14 sec. 3 LuftSiG, because the statutory provision was anyway not designed to address attacks against the body politic and the state's legal and constitutional system[1870]. Sacrifice entails becoming means to ends, yet signifies in a sense the antipode of objectification as it involves transcendence and transascendance of the self in solidarity, fraternity and responsibility. Resisting overall involvement with the question whether the constitutionality of § 14 sec. 3 LuftSiG can be grounded in the duty to sacrifice oneself for the protection of the body politic and the state's legal and constitutional system, the FCC noticed that these aims are excluded from the area of application of § 14 sec. 3 LuftSiG. In other words, the Court remained silent on the matter, producing legal arguments about the objective of the contested statute instead.

Critical reflection – through a hermeneutic and literary lens – on how the theme of sacrifice features in the Court's argumentation would probably encourage inclination towards the assessment of consistency with linguistic-analytical insights on the metaphysical subject as the limit of the world and transcendental ethics on the one hand, and with the phenomenological distinction between totality and infinity on the other. The ideas of solidarity, fraternity, responsibility and morality as they appear in the thought of Levinas shed light on aspects of the meaning of the duty to sacrifice. The ethics manifested in these concepts allude to the notion of transcendence. The presence of such language in the practice of law indicates law's meta-dimension, namely transcendence of the boundaries of legal language games, that is, totality structures, and, at the same time, transascendance towards infinity.

What can only be shown cannot be said; the Court's abstention from elaborating on the irrelevance of a duty to sacrifice apropos the legal language game can be viewed as an affirmation, in practice, of Wittgenstein's proposition. Individual human beings are metaphysical subjects and the limit of their world; as such, they are respected for being absolutely Other. The Court evaded the elucidation of the duty to

[1870] BVerfGE 115, 118 (159) ['§§ 13 to 15 LuftSiG serve to prevent, in the context of police power, the occurrence of especially grave accidents within the meaning of Art. 35 sec. 2 sent. 2 and 3 GG. As appears from the reasoning of the Act, such accidents can be politically motivated but can also be caused by criminals or by mentally confused persons acting on their own. […] Under these circumstances, there is no room to assume a duty to intervene within the meaning that has been explained.']

sacrifice and the demonstration of reasons for resisting its institution as a basis for justification within the realm of law. In similar fashion to the Court's position on the duty of the mother to sacrifice herself in the *Abortion I Case,* such duty found no place in the totality of the *Aviation Security Act Case* legal language game.

Self-determined human beings can virtuously sacrifice themselves; this cannot, however, be expected of them within a constitutional order founded on the law of human dignity, since it would mean the destruction, in phenomenological terms, of the radical distance between the state as self and human beings as the other, and would compromise respect for the other as absolutely Other. Virtue of character manifested in the willingness of the metaphysical subject to change the limits of the world or the legal language game as a subtotal of the world cannot be forced on human beings – only, perhaps, cultivated. The analysis of the duty to sacrifice oneself intimates most paradigmatically the idea of asymmetry[1871] in the relational – linguistic-analytical and phenomenological – accounts of human dignity in Chapter One. No standard for evaluating whether the answer to the other is responsible is offered here. Be that as it may, the Court introduced an important clarification, which essentially affirms that both totality and infinity constitute aspects of the meaning of practicing the law of human dignity. The FCC pointed to the lens of law as the determinant of what can be said within the totality of the legal language game produced. Delineating a totality substantiates that something, or 'something missing', lies beyond and outside that space.

v. An alternative portrayal: the perpetrators as the other

To this point in the analysis of the *Aviation Security Act Case*, the perpetrators have been viewed as another self who harms the other. A parallel drawn between the state shooting down the aircraft to avert the danger for the lives of those on the ground on the one hand, and the offenders of the crime apropos the harm inflicted on the passengers and crew on board on the other, can be identified in the text of the *Aviation Security Act Case*. The FCC treats the perpetrators not only as a self, but also as the other, and this dual depiction occasions the second conceivable portrayal of the practice of the law of human dignity in this legal language game.

[1871] Levinas, *Totality and Infinity*, 244 ['God sees the invisible and sees without being seen.']

> § 14 sec. 3 LuftSiG is, however, compatible with Art. 2 sec. 2 sent. 1 GG in conjunction with Art. 1 sec. 1 GG to the extent that the direct use of armed force is aimed at a pilotless aircraft or exclusively [*ausschließlich*] at persons who want to use the aircraft as a weapon of a crime against the lives of people on the ground.[1872]

The other is defined as the person who intends to use the aircraft 'as a weapon of a crime against the lives of people on the ground'. The definition encapsulates the phenomenology of the relation between the perpetrator as the self and the people on the ground as the other and, at the same time, expresses the perception of the perpetrator as the other from the viewpoint of the speaking self, namely the Court. Unlike the use of armed force against a pilotless aircraft, on the constitutionality of which no elaboration is deemed necessary[1873], whether armed force aimed 'exclusively' at the perpetrators constitutes a responsible response to this concretization of the other begs critical reflection and close scrutiny.

> Whoever, such as those who want to abuse an aircraft as a weapon to destroy human lives, unlawfully attacks the legal interests of others is not fundamentally called into question as regards his or her quality as a subject by being made the mere object of state action […] if the state defends itself against the unlawful attack and tries to avert it, complying with its duty to protect vis-à-vis those whose lives are intended to be annihilated. On the contrary, it exactly corresponds to the attacker's position as a subject if the consequences of his or her self-determined conduct are attributed to him or her personally, and if the attacker is held responsible for the events that he or she started. The attacker's right to respect of the dignity that is inherent also to him or her is therefore not impaired.[1874]

The assertion that the punishment honors the criminal was deemed incompatible with the Basic Law in the *Life Imprisonment Case*, where the Court essentially distinguished between criminal law and constitutional law as lenses through which to look at reality in order to decide on the subsumption or non-subsumption of facts and issues, theories and doctrine under the legal language game produced. The Court outlined the sphere of responsibility of the offenders under the circumstances and how this influences the gravity of the encroachment.

[1872] BVerfGE 115, 118 (160)
[1873] BVerfGE 115, 118 (160) ['To this extent the guarantee of human dignity under Art. 1 sec. 1 GG is not contrary to the ordering and carrying out of an operation pursuant to § 14 sec. 3 GG. This goes without saying in operations against a pilotless aircraft but also applies in the other case.']
[1874] BVerfGE 115, 118 (161)

> However, the encroachment upon fundamental rights carries much weight because the execution of the operation pursuant to § 14 sec. 3 LuftSiG will with near certainty result in the death of the people on board the plane. But under the combination of circumstances that is assumed here, it is these people themselves who, as offenders, have brought about the necessity of state intervention, and that they can avert such intervention at any time by refraining from realizing their criminal plan. It is the people who have the aircraft under their command who determine the course of events on board, but also on the ground in a decisive manner. Their killing can only take place if it can be established with certainty that they will use the aircraft that is under their control to kill people, and if they keep to their plan even though they are aware of the danger to their lives that this involves for them. This reduces the gravity of the encroachment upon their fundamental rights. [1875]

In this portrayal of the perpetrator as the other, self-determination and self-responsibility constitute the defining aspects of human dignity meaning. Self-responsibility presumes the ability to practice self-determination. The Court noted, not only is the quality of the subject in the face of the perpetrators not challenged by state action as prescribed in § 14 sec. 3 LuftSiG, but, on the contrary, the state as self accords them the constitutionally guaranteed respect for their human dignity by responding to their self-determined conduct. State action using armed force 'exclusively' against the perpetrators is compatible with the phenomenological account of the meaning of practicing human dignity in law, in that it mirrors an understanding of the other as a self-determined and self-responsible, hence absolutely separated from the self, human being. The uncertainty and imponderability arising from the circumstances of an operation pursuant to § 14 sec. 3 LuftSiG fall within the sphere of the perpetrators' self-determination and self-responsibility. Uncertainty and imponderability distort the task of a totalizer self and the validity of synoptic thought. The speaking self is thus challenged to address those traits of life in a responsible manner. As the following excerpt shows, the speaking self deals with the uncertainty and imponderability incidental to the circumstances of the case by locating those within the sphere of responsibility of either the state, in the case of innocent passengers and crew on board the aircraft, or the perpetrators, when the latter are the only ones on board.

> If those who have the aircraft under their command do not intend to use it as a weapon, if therefore the corresponding suspicion is unfounded, they can, on the occasion of the early measures carried

[1875] BVerfGE 115, 118 (164)

> out pursuant to § 15 sec. 1 LuftSiG and § 14 sec. 1 LuftSiG, for instance on account of the threat to use armed force or on account of a warning shot, easily show by cooperating, for instance by changing course or by landing the aircraft, that no danger emanates from them. The specific difficulties that can arise as regards communication between the cabin crew, which is possibly threatened by offenders, and the cockpit, and between the cockpit and the decision-makers on the ground, do not exist here. […] If no indications exist that there are people on board an aircraft that has become conspicuous who are not participants in the crime, remaining uncertainties – for example as regards the underlying motives of the aerial incident – refer to a course of events that has been started, and can be averted, by those against whom the measure averting danger pursuant to § 14 sec. 3 LuftSiG is exclusively directed. [1876]

The soundness of deducing that the state does not objectify the perpetrators from the ascertainment that the latter acted in self-determination and self-responsibility and asserting that their right to human dignity was not thereby compromised calls for critical reflection. As in other instances in the text of the *Aviation Security Act Case,* the Court failed to demonstrate with clarity the determinant of the meaning produced. Apparently, the action of shooting down an aircraft under the circumstances of § 14 sec. 3 LuftSiG as such is not univocal; its significance depends on who is being shot at. Whose, then, is the decisive viewpoint, understood in hermeneutic and literary terms? Should the viewpoint of the self and the other be evaluated separately, or examined in relation to one another? In the phenomenological portrayal of the *Aviation Security Act Case* it is plain to see that the Court, the speaking self, gives prominence to how the other perceives of him or herself, namely to the experiences and the responsibility he or she assumes, and centers on the face of the other to make sense of the meaning of his or her actions. Precedence to the viewpoint of the other can be interpreted as hospitality towards the stranger. In the text of the decision, however, this is paired with abstention from enhancing the depiction of the self; the surfacing disparity between the portrayal of the other and the non-portrayal of the self requires closer scrutiny and critical reflection.

vi. The self, the human factor within institutions

Focusing on the production of meaning by the self can be associated with the practice of the law of human dignity as a duty to respect and protect human dignity;

[1876] BVerfGE 115, 118 (161f.)

emphasizing the other alludes to the corresponding subjective right of defense against the state.[1877] How the duty ensuing from the law of human dignity is understood and portrayed in each case is, therefore, indicative of how the speaking self, the Court, portrays the state as self.

The state and its bodies 'have a broad margin of appreciation, evaluation and organization' [*Einschätzungs-, Wertungs- und Gestaltungsbereich*][1878] in complying with the duty of protection in line with 'the objective content of fundamental rights'[1879]. In other words, the self has extensive authority over the meaning produced. This duty is not defined 'in principle'[1880]. Why is that so? Seeking an explanation for 'something always missing', I resort to the idea of morality in *Totality and Infinity*. The human factor is mirrored in the anthropomorphic portrayal of 'how the state bodies comply with such duties', namely 'as a matter of principle, by themselves on their own responsibility […].'[1881]

vii. The principle of proportionality as an appeal to intersubjective space

Another constitutional standard employed in the *Aviation Security Act Case* is the principle of proportionality[1882], which, similarly to the law of human dignity, communicates the meta-dimension of law. Practicing the principle of proportionality opens up the possibility of an intersubjective space. The advantage of this hermeneutic and literary approach is that it can affirm the happening of the intersubjective space in the text of the *Aviation Security Act Case*, whereas a doctrinal approach would simply stress the inapplicability of the proportionality test. The objective served by the contested provision is to save human lives. In view of 'the ultimate value' of human life in the constitutional order of the Basic Law, 'this is a regulatory purpose of such weight that it can justify the serious encroachment upon

[1877] BVerfGE 115, 118 (16); ibid (152) ['In view of this relation between the right to life and human dignity, the state is prohibited, on the one hand, from encroaching upon the fundamental right to life by measures of its own, thereby violating the ban on the disregard of human dignity. On the other hand, the state is also obliged to protect every human life. This duty of protection demands of the state and its bodies to shield and to promote the life of every individual, which means above all to also protect it from unlawful attacks, and interference, by third [cited cases omitted]. Also this duty of protection has its foundations in Article 1 sec. 1 sent. 2 GG, which explicitly obliges the state to respect and protect human dignity [cited cases omitted].']
[1878] BVerfGE 115, 118 (159)
[1879] BVerfGE 115, 118 (160)
[1880] BVerfGE 115, 118 (160)
[1881] BVerfGE 115, 118 (160)
[1882] BVerfGE 115, 118 (124)

the right to life of the offenders on board the aircraft.'[1883] The provision was found suitable if only the perpetrators are on board the aircraft and it can be predicted that shooting it down 'can avert the danger from the people on the ground […]'[1884]. It was also found necessary for achieving the objective of saving human lives, 'because no equally effective means is apparent that does not impair the offenders' right to life at all, or impairs it less […].'[1885]

> Finally, the authorisation to use direct armed force against an aircraft on board of which there are only people who want to abuse it within the meaning of § 14 sec. 3 LuftSiG, is also proportional in the narrower sense. According to the result of the overall weighing up between the seriousness of the encroachment upon fundamental rights that it involves and the weight of the legal interests that are to be protected […], the shooting down of such an aircraft is an appropriate measure of averting danger which is reasonable for the persons affected if there is certainty about the elements of the offence.[1886]

Does the contested provision, in the end, reflect that the state is able to respond to the other, namely, each time, to the threatened, thus vulnerable, human being? The phenomenological analysis of the *Aviation Security Act* sheds light on the importance of the *ad hoc* evaluation of circumstances in cases marked by the traits of uncertainty and imponderability. *Ad hoc* approaches evoke the practice of the pre-ethics set out in *Totality and Infinity* in the face-to-face encounter. As far as the applicability of § 14 sec. 3 LuftSiG is concerned, the Court explained that if the assessment of the *ad hoc* case leads to 'the safe judgment that there are only offenders on board the aircraft' and to 'the prognosis that state action could save the lives of the people on the ground', then 'the success that is intended to be achieved by § 14 sec. 3 LuftSiG is furthered' [*wird der Erfolg, der mit § 14 sec. 3 LuftSiG erreicht werden soll, gefördert*].[1887] The FCC concluded that the ability of the state, the self, to respond to the other, as manifested in the contested provision, 'cannot be generally denied.'[1888] Whether the self acts responsibly should be assessed apropos who the other is perceived to be as ensuing from the text of the decision.

[1883] BVerfGE 115, 118 (162)
[1884] BVerfGE 115, 118 (162f.)
[1885] BVerfGE 115, 118 (163)
[1886] BVerfGE 115, 118 (163f.)
[1887] BVerfGE 115, 118 (163)
[1888] BVerfGE 115, 118 (162)

4. Concluding observations

The hermeneutic and literary portrayal of the *Abortion I Case* has demonstrated an inconsistency between the meaning of a particular manifestation of human being-ness, the relation of the pregnant woman to the unborn child, within the realm of life and the rendering of this relation in the legal language game produced by the FCC. The imprint of unborn life on the *Menschenbild* of the signified as 'something missing' prior to its occupation, emphasized qualities such as potentiality and continuity. Recognizing the human dignity of the unborn, the Court essentially justified commitment to ensuring the traversal of limits by the fetus in coming-into-being and unfolding its essence.

V. The *Subsistence Minimum Case* (2010)[1889]

The *Subsistence Minimum Case* touches on those aspects of human being-ness with respect to which the *Menschenbild* and the law of human dignity would be expected, on an unsophisticated first reading, to need no concretization *ad hoc* as, apropos the existence of basal needs associated with the very subsistence, all particular diverse concretizations of human being-ness are same. However, appearing committed to a face-to-face encounter in view of the law of human dignity, the Court looked beyond the ostensible sameness, and identified particulars of the human image that influence the scope of what amounts to a subsistence minimum, while, moreover, addressing the issue of lack of provision for atypical circumstances requiring. In the *Subsistence Minimum Case* the Court engaged in a systematic perusal of the methods, models of calculation and sources of data employed by the legislature to estimate the amount of benefits. On the basis of its findings, it decided that certain benefits defined in the statutory law were incompatible with the constitution on the basis of inconsistencies and randomness in their assessment.

1. Decision

The fundamental right to a subsistence minimum in line with human dignity ensues from Art. 1 sec. 1 GG in conjunction with the principle of the social state under Art. 20 sec. 1 GG, and constitutes an autonomous legal basis for the Court's

[1889] BVerfGE 125, 175 (2010) [*Hartz IV,* referred to presently as *Subsistence Minimum Case*], First Senate of the FCC

argumentation that encompasses both physical existence, which depends on securing essential material needs, and access to a minimum participation in social, cultural and political life. Though the decision is additionally premised on the absolute guarantee of human dignity under Art. 1 sec. 1 GG, the fundamental right that flows from human dignity and the social state principle enjoys an independent standing and the determination of its practice does not lie entirely in the hands of the legislature. However, practicing this fundamental right requires concretization and regular updating to ensure that the actual needs corresponding to a subsistence minimum are addressed. The development of the polity and the conditions of life are factors to be taken into account by the legislator in assessing the adequate amount of social benefits. The latitude of the legislator to identify the types of needs and the appropriate means to meet those was recognized by the Court, which took into account that these are not directly pointed to in the Basic Law.

The First Senate of the FCC found the *Second Book of the Social Law* [*Zweiten Buches Sozialgesetzbuch* (SGB II)] provisions re the standard benefit for adults and children incompatible with the constitutional guarantee ensuing from Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG, namely the fundamental right to a subsistence minimum in line with human dignity. Unconstitutional provisions would remain applicable until new ones would be enacted by the legislator. The claim to the benefit for atypical needs could be established even before the enactment of the new statutory provisions for it was directly grounded on the Basic Law. There was no duty on the part of the legislature to retroactively fix the benefits derived from Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG.

The requirement of a consistent, transparent[1890] and appropriate procedure for estimating the expenditure that adequately covers the subsistence minimum is central to the Court's line of argumentation. Ultimately, the benefits should be in tune with actual and real needs, and the sources and methodologies used in calculating those consistent and accessible. Since the Basic Law offers no orientation with regards to how the claim to a subsistence minimum in line with human dignity should be concretized, the FCC may engage in a restricted substantive review and consider only evidently insufficient benefits[1891], leaving the task of concretization to the legislature. Apart from assessing whether the benefits conform to an essential

[1890] Spellbrink (2011) 661, 664
[1891] ibid 661, 663f.

baseline, the methods employed to calculate those should be subject to scrutiny. Emphasis on the consistency of applied methods enhances the traceability of the statutory regulation's conformity to fundamental rights standards and enables the ascertainment of justifiability of the decided benefits.

In judging the *Subsistence Minimum Case,* the FCC reviewed the legislature's compliance with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG in figuring the benefits, the suitability of methods of calculation, the extent to which the surveying of facts required for deciding on the benefits was exhaustive, and, finally, whether the legislature had consistently respected the boundaries of its latitude. Transparent disclosure of the various components of the calculation procedure of the subsistence minimum and corresponding benefits was deemed indispensible to the possibility of review by the FCC. If this crucial parameter is not observed, the subsistence minimum is presumed to be incompatible with Art. 1 sec. 1 GG.

The standard benefits were not, in the Court's view, evidently insufficient to secure a subsistence minimum in line with human dignity[1892]. No constitutional objection could be raised against the standard benefit amount of €345 on grounds of evident insufficiency, since it covered the material needs essential to maintaining a subsistence minimum. With regards to the social, cultural and political aspect of the subsistence minimum, the latitude of the legislature is considerably broad; hence an ascertainment of evident insufficiency could not be established.[1893] Along the same lines, the amount of €311 for adult partners in a joint household and the amount of €207 for children between 7 and 14 years of age were not considered evidently

[1892] ibid

[1893] Cf. Michael Walzer, *Spheres of Justice – A Defense of Pluralism and Equality* (New York: Basic Books, 1983) 8 ['There is no single set of primary or basic goods conceivable across all moral and material worlds – or, any such set would have to be conceived in terms so abstract that they would be of little use in thinking about particular distributions. Even the range of necessities, if we take into account moral as well as physical necessities, is very wide, and the rank orderings are very different. A single necessary good, and one that is always necessary – food, for example – carries different meanings in different places. Bread is the staff of life, the body of Christ, the symbol of the Sabbath, the means of hospitality, and so on. Conceivably, there is a limited sense in which the first of these is primary, so that if there were twenty people in the world and just enough bread to feed the twenty, the primacy of bread-as-staff-of-life would yield a sufficient distributive principle. But that is the only circumstance in which it would do so; and even there, we can't be sure. If the religious uses of bread were to conflict with its nutritional uses […] it is by no means clear which use would be primary. How, then, is bread to be incorporated into the universal list? The question is even harder to answer, the conventional answers less plausible, as we pass from necessities to opportunities, powers, reputations, and so on. These can be incorporated only if they are abstracted from every particular meaning – hence, for all practical purposes, rendered meaningless.']

insufficient[1894], since it was reasonable for the legislature to assume that the expenditure in those cases would be lower, even if the financial minimum needs cover basically the physical aspect of the subsistence minimum.

The FCC found the legislature's statistical analysis (statistical model, sample survey, selection of reference group, criteria of evaluation) reliable, and the empirical data employed suitable. The Court scrutinized, to the extent permitted by its latitude, the appropriateness and justifiability of methods. The legislature, noted the Court, should be able to demonstrate that the classification of expenditure items in the divisions of the sample survey was based on empirical data. The Court stressed the importance of ensuring the soundness of the empirical basis used for the various estimations in which the legislature engaged in order to ascertain the amount of benefits. It found that the standard benefit of €345, although – as mentioned *supra* – not evidently insufficient[1895], had in fact not been calculated in a constitutionally acceptable manner because the structural principles underlying the statistical model had been applied inconsistently without factual justification. The Court moved on to identify instances of deviation from the standard set by the legislature and, additionally, the absence of reasoning in support of the change of standard.

Since the standard benefit of €345 was found unconstitutional, the therefrom derived benefits, €311 for partners living together and €207 for children, also did not comply with constitutional requirements. With regards to the social allowance of €207 for children, the FCC additionally noted that no justifiable method was resorted to by the legislature in order to determine the subsistence minimum of a child before completing the age of 14. The specific needs of that group were neither inquired into, nor systematically juxtaposed to those of an adult. The estimation of the particular amount at 40 per cent less than the standard benefit of a single adult appeared to be random, that is, not methodically sound and empirically verified. Needs related to education were enumerated by the FCC, while not addressing those as claims to a dignified subsistence minimum was directly associated with exclusion from chances in life. Finally, the Court noticed that nowhere in the procedure followed by the legislature did the evaluation of children's subsistence minimum in line with human dignity appear to be contingent on age differences.

[1894] Spellbrink (n 1890) 661, 663f.
[1895] ibid

Another gap in the statute giving rise to incompatibility with the fundamental right under Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG was the absence of provision for a claim to benefits corresponding to a current non-recurring special need. The standard benefit only reflected the average need in usual circumstances and was not designed to address atypical needs exceeding it. The granting of a standard benefit as a fixed rate was considered in principle permissible. The effectiveness of the fixed rate model is associated with the responsibility recognized to the individual to organize his or her own expenditure and practice saving up. If, however, these sources were proven insufficient to tackle an irrefutable, current, non-recurring special need, the legislature would have to provide for a hardship arrangement and institute a claim to assistance benefits for the purpose of meeting that special need.

The responsible state organs are under the duty to protect the dignity of human beings from violations by foreign states as third parties[1896]. Human dignity is thus foundational a legal concept to asylum law.[1897] That foreigners or stateless persons fall within the subjective scope of Art. 1 sec. 1 GG has been established in FCC jurisprudence[1898]. In the context of the protection of the subsistence minimum, the FCC as an evolving self[1899] appears to be practicing intensely self-reflection and to be willing to dig deep to ensure that a responsible answer is given to the other. In the recent FCC judgment[1900] on the amount of cash benefits paid in accordance with the *Asylum Seekers Benefits Act*, the Court held the amount insufficient on the grounds

[1896] Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 41

[1897] BVerfGE 54, 341 (357) (1980) [*Wirtschaftsasyl*] ['Voraussetzungen und Umfang des politischen Asyls sind wesentlich bestimmt von der Unverletzlichkeit der Menschenwürde, die als oberstes Verfassungsprinzip nach der geschichtlichen Entwicklung des Asylrechts die Verankerung eines weitreichenden Asylanspruchs im Grundgesetz entscheidend beeinflußt hat. Zu dem asylrechtlich geschützten Bereich der persönlichen Freiheit gehören grundsätzlich auch die Rechte auf freie Religionsausübung und ungehinderte berufliche und wirtschaftliche Betätigung, die bei den Beschwerdeführern ihren Angaben zufolge über die Unversehrtheit von Leib und Leben hinaus gefährdet sind. Soweit nicht eine unmittelbare Gefahr für Leib, Leben oder persönliche Freiheit besteht, können Beeinträchtigungen der bezeichneten Rechtsgüter allerdings ein Asylrecht nur dann begründen, wenn sie nach ihrer Intensität und Schwere die Menschenwürde verletzen und über das hinausgehen, was die Bewohner des Heimatstaats aufgrund des dort herrschenden Systems allgemein hinzunehmen haben. Das Asylrecht wegen politischer Verfolgung soll jedenfalls nicht allgemein jedem, der in seiner Heimat benachteiligt wird und etwa in materieller Not leben muß, die Möglichkeit eröffnen, seine Heimat zu verlassen, um in der Bundesrepublik Deutschland seine Lebenssituation zu verbessern.']; BVerfGE 56, 216 (235 f.) (1981) [*Rechtsschutz im Asylverfahren*]

[1898] See BVerfGE 50, 166 (1979) [*Ausweisung I*]; See also Starck, Art. 1 Abs. 1, *GG Kommentar* (2010) para 82 fn 270

[1899] 'That the BVerfGE has decided differently in the past, does not stand as an argument.' In Spellbrink (n 1890) 661, 663 [legal science and jurisprudence as interactive processes]

[1900] BVerfGE 132, 134 (2012) [*Asylbewerberleistungsgesetz*], First Senate of the FCC

that it had not been changed since 1993. In judging this case, the fundamental right to a subsistence minimum in line with human dignity was put forward.

The Court portrayed a multidimensional *Menschenbild* and required that physical existence needs and interpersonal relationships as well as a minimum of participation in social, cultural and political life be attended to by means of the amount secured. The subjective scope of the entitlement to this fundamental right expanded to include both German and foreign nationals residing in Germany, regardless of residence status. Deviations from this imperative, which expresses the vitality of the subsistence minimum and alludes to the law of human dignity as its foundation, should be grounded, according to the Court, in consistent substantiation of differentiations and transparency of the content of estimation procedures followed. Casting the focus on the guarantee of a subsistence minimum in line with human dignity shows how rights across levels of constitutionalism seem to further one and the same claim and to, thus, generate legal pluralism. Personal legal pluralism[1901] surfaces in the text of the *Subsistence Minimum Case* since the right deriving from Art. 1 sec. 1 GG and Art. 20 sec. 1 GG may also be viewed as a human right.

2. Discussion

The guarantee of a dignified existence constitutes, historically, the first framing of human dignity as a legal concept. In the 1919 *Weimarer Reichsverfassung* the dignified existence [*menschenwürdiges Dasein*] was protected as an aspect of the economic life regulations [*Ordnung des Wirtschaftslebens*].[1902]

Human dignity is, according to Spellbrink, the only constitutional foundation for the right to a subsistence minimum and the claim to the guarantee of a subsistence minimum in line with human dignity. The right under Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG is fundamental in character and covers not only the standard benefit, but also atypical needs. This understanding is attuned to both the *Mitgifttheorie* and the *Leistungstheorie* conceptions of human dignity meaning. In line with the former, every human being is supplied with the essentials; the latter, premised on the association of human dignity with achievement or performance,

[1901] See Baer, *Rechtssoziologie* (2011) 90ff.
[1902] Kunig, Art. 1, *GG Kommentar* (2012) para 2

enables the self-care of the individual through the legal claim to elemental performance.[1903]

Spellbrink argues that focusing on the question of the needs to be included in the standard benefit leads to the devaluation of Art. 1 sec. 1 GG, that is, to the 'kleine Münze' effect, because it sets the stage for exceeding the truly elemental needs and adding to the scope of the standard benefit petty demands.[1904] Voices in the legal scholarship alert the FCC not to render the guarantee of human dignity a general catchphrase for all problems of social law, since these are – save subsistence minimum cases – handled in traditional legal doctrine.[1905] The FCC in earlier cases resisted producing jurisprudence on the duty of the state to deal with material need [*materieller Not*], but later changed this stance.[1906] The state must guarantee in any case the minimum requirements for an existence in line with human dignity [*menschenwürdiges Dasein*] to those citizens who, due to physical or mental disability or in lack of own means to their personal and social development, are unable to sustain themselves. [1907]

FCC subsistence minimum jurisprudence emphasizes the latitude and discretion [*Gestaltungsfreiheit*] of the legislator to support individual human beings in need and to establish their claim to protection of a dignified subsistence minimum in line with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG[1908]. Starck notes, since this claim springs directly from the constitution, its financial effects should be clearly assessed and granted irrespective of the financial situation of the state;

[1903] Spellbrink (n 1890) 661, 663
[1904] ibid 664
[1905] ibid 661
[1906] BVerfGE 1, 97 (104) (1951) [*Hintergebliebenrente I*] [the duty of protection on the part of the state concerns protection from violations of human dignity by others, not the protection from material need]; Cf. *Life Imprisonment Case* BVerfGE 45, 187 (228) (1977) [the subsistence minimum essential to an existence [*Dasein*] in line with human dignity is guaranteed]; Starck (n 1898) para 41
[1907] BVerfGE 40, 121 (133) (1975) [*Weisenrente*, orphans' pension]; BVerfGE 45, 187 (228) (1977) [*Life Imprisonment Case*]; BVerfGE 48, 346 (361) (1978) [widows' pension]; BVerfGE 82, 60 (85) [non-taxable subsistence minimum]; BVerfGE 87, 153 (170) (1990) [*Steuerfreies Existenzminimum*, subsistence minimum and taxation of income]; BVerfGE 91, 93 (111) (1994) [*Kindergeld*, child benefits]; BVerfGE 123, 276 (363) (2009) [*Lisbon Case*; social state structures in view of the duty to ensure a subsistence minimum in line with human dignity and the principle of the social state]; Starck, ibid; Geddert-Steinacher (1990) 103f.; V. Neumann, 'Menschenwürde und Existenzminimum' (1995) *NVwZ* 426 at 429 f.
[1908] Starck ibid; Wallerath, 'Zur Dogmatik eines Rechts auf Sicherung des Existenzminimums' (2008) *JZ* 157, 162 [difficulties in the assessment of the subsistence minimum on account of the subjectivity of needs]; Spellbrink (n 1890) 66, 661 [The scrutiny exercised on calculation methods employed by the legislature in estimating the standard benefit created the impression that there is a 'true' amount of the standard benefit that can be derived directly from the constitution.]

otherwise they would amount to no more than merely a declaration of good will.[1909] The legislator is therefore under a duty to define – concretize [*Konkretisierung*] and actualize [*Aktualisierung*][1910] – and safeguard a subsistence minimum in line with human dignity.[1911] Commenting on the *Subsistence Minimum Case*, Spellbrink notices how the margin of appreciation [*Gestaltungsspielraum*][1912] of the legislature becomes narrower on occasion of the constitutional review exercised by the FCC. The principle of the social state compels the legislature to scrutinize closely and determine the standard benefit corresponding to a subsistence minimum in line with human dignity.[1913]

What a subsistence minimum in line with human dignity, comprising physical existence needs and the possibility of attending to inter-human relations and ensuring participation in social, cultural and political life, entails, evolves in the course of time owing to changes of circumstances and viewpoints in the society.[1914] Dealing with the multifactorial character of this subject matter within the realm of law begs for transparency in demonstrating the reality check involved in the estimation of the respective amounts. [1915] As Starck explains, the protection of the fundamental right extends also to the process of determining the subsistence minimum, because scrutinizing the outcome of calculations and evaluations ensuing from the practice of Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG can only be limited.[1916]

Wallerath discusses extensively the multidimensional question of resources, a dominant discussion across levels of constitutionalism[1917], and identifies three interlaced problem-zones: the normative deduction of a right from the state duty to guarantee the subsistence minimum; whether the claim to a subsistence minimum is a subjective right of the individual or an objective duty of the state from which the individual reflexively derives benefits; and, on account of the dominant distinction between the physical and the socio-cultural aspects of the subsistence minimum, the doctrinally established objective scope of the claim and the duty.[1918] Discourse on the

[1909] Starck ibid
[1910] BVerfGE 125, 175 (222)
[1911] Starck (n 1898)
[1912] BVerfGE 125, 175 (222)
[1913] Spellbrink (n 1890) 661, 661
[1914] Starck (n 1898) 41
[1915] ibid
[1916] ibid
[1917] Wallerath (n 1908) 157, 165 ff.
[1918] Ibid 159-60

ecological subsistence minimum[1919] constitutes another field of critical reflection and self-reflection as regards the objective and subjective protective scope it demands in line with Art. 1 sec. 1 GG and Art. 20 sec. 1 GG.

3. Analysis

The purpose of the following analysis is to portray what amounts to humane practice of the law of human dignity, termed ontologically, linguistic-analytically and phenomenologically. Themes raised in the analysis are the nexus between humanism and pragmatism, the, empty or ad hoc concretized, *Menschenbild*, and the manifestation of the dual sense of 'something missing' in the discussion on the lack of provision for atypical needs. The interplay between life and law, the effort to survey the field of sight and to provoke the intersection of the legal language game with other language games, while demonstrating openness to look at the statutory law through other lenses, cause the boundaries of the *Subsistence Minimum Case* legal language game to fluctuate. Fraternity and solidarity feature most prominently in the phenomenological portrayal of the *Subsistence Minimum Case*.

a. Ontological

The sense in which a subsistence minimum in line with human dignity is ontologically relevant and significant is plain to see. In the analysis that follows, I discuss aspects of the guarantee, specifically, of a dignified subsistence minimum and of seeking to achieve the closest possible interaction between the realms of law and life in this area of production of meaning.

i. Humanism and pragmatism: the benefit claim and the experience of deadlock when traversal of limits is foreclosed

The fundamental right to a subsistence minimum in line with human dignity derives from Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG[1920] and

[1919] Geddert-Steinacher (1990) 74ff.; Starck (n 1898) para 93 [Guaranteeing an environmental subsistence minimum can be pursued through repressively effective criminal law means addressing environmental damage by third parties, and – primarily – preventive administrative law measures through which facilities posing a danger for the environment shall be required to attain permission.]; See also Art. 20a GG ['The state, also in its responsibility for future generations, protects the natural foundations of life and the animals34 in the framework of the constitutional order, by legislation and, according to law and justice, by executive and judiciary.'].

[1920] BVerfGE 1, 97 (104) ['Wenn Art. 1 Abs. 1 GG sagt: "Die Würde des Menschen ist unantastbar", so will er sie nur negativ gegen Angriffe abschirmen. Der zweite Satz: "... Sie zu achten und zu

establishes a claim grounded on the constitutional guarantee of human dignity, yet operates autonomously, that is, above and beyond to Art. 1 sec. 1 GG, and develops an absolute effect.[1921] The text of the *Subsistence Minimum Case* conveys the positive meaning of the practice of the law of human dignity; granted, whether the law of human dignity can be positively determined has been problematized in FCC jurisprudence and legal scholarship.[1922]

> Art. 1 sec. 1 GG declares human dignity to be inviolable and obliges all state authority to respect and protect it [cited cases omitted]. As a fundamental right, the provision is not only a defensive right against encroachments on the part of the state. The state must also protect human dignity in positive terms [cited cases omitted].[1923]

Furthermore, '[t]he principle of the social welfare state contained in Art. 20 sec. 1 GG in turn grants to the legislature the mandate to ensure a subsistence minimum for all that is in line with human dignity.'[1924] The FCC noted that the legislature is expected to honor the fundamental right to a subsistence minimum in accordance with human dignity, and clarified that the right 'is not subject to the legislature's disposal […]'[1925]. The legislature is entrusted with concretizing this right to the ends of furthering the humanism of the law and mindful of critical pragmatic considerations[1926], while receiving a margin of appreciation in the unavoidable

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schützen ist Verpflichtung aller staatlichen Gewalt" verpflichtet den Staat zwar zu dem positiven Tun des "Schützens" doch ist dabei nicht Schutz vor materieller Not, sondern Schutz gegen Angriffe auf die Menschenwürde durch andere, wie Erniedrigung, Brandmarkung, Verfolgung, Ächtung usw. gemeint.']; See also Wallerath (n 1908) 160f.; Spellbrink (n 1890) 661, 663 [the guarantee of human dignity under Art. 1 GG is the only available substantive constitutional basis for establishing the basal right to the guarantee of subsistence]

[1921] BVerfGE 125, 175 (259) ['Otherwise, there would be a violation of Art. 1 sec. 1 GG which may not be accepted even on a temporary basis.']

[1922] Wallerath (n 1908) 160

[1923] BVerfGE 125, 175 (222)

[1924] BVerfGE 125, 175 (222)

[1925] BVerfGE 125, 175 (222)

[1926] BVerfGE 125, 175 (222) ['[…] [The right] must however be lent concrete shape, and be regularly updated, by the legislature, which has to orientate the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life. It has latitude in bringing about this state of affairs.']; ibid (224) ['[...] the establishment of monetary benefit claims also entails a considerable financial impact on public budgets. Such decisions are however reserved for the legislature.']; ibid (224) ['It depends on society's views of what is necessary for an existence that is in line with human dignity, and on the concrete circumstances of the person in need of assistance, as well as on the respective economic and technical circumstances, and is to be specifically determined by the legislature in accordance with them [cited case omitted]. The principle of the social welfare state contained in Art. 20 sec. 1 GG obliges the legislature to cover social reality in a manner that is appropriate to the present day and realistic with regard to the guarantee of the subsistence minimum that is in line with human dignity, which for instance is different in a technological information society

valuations linked to determining the amount of the subsistence minimum.[1927] Not only how the dignified subsistence minimum can be maintained, but also 'the scope of the benefits to secure one's livelihood' require concretization[1928]. The role of the FCC is to examine whether the outer limits of the legislature's margin of appreciation are respected in deliberating and deciding on 'non-constitutional law' measures[1929]. The standard of evident insufficiency or manifest inadequacy[1930], far from being a legal or legalistic device, reflects the gravity of the threat to human being-ness, which is understood in the *Subsistence Minimum Case* predominantly as a threat to the very existence of human beings, and the urgency of restoring the constitutionality of social welfare measures.

In-depth analysis of hermeneutic and literary parallels between the notions of the limit traversed and the limit that delineates on the one hand, and the claim – constitutional and statutory – to a subsistence minimum that is in line with human dignity on the other, aspires to portray law's meta-dimension as it features in the *Subsistence Minimum Case*. In the following excerpt, the practice of the law of human dignity delivers an astute description of the experience of deadlock and conveys law's humanism.

> If a human being does not have the material means to guarantee an existence that is in line with human dignity because he or she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties, the state is obliged within its mandate to protect human dignity and to ensure, in the implementation of its social welfare state mandate, that the

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than was previously the case. The evaluations which are necessary here are a matter for the parliamentary legislature.']

[1927] BVerfGE 125, 175 (222)

[1928] BVerfGE 125, 175 (224f.)

[1929] BVerfGE 125, 175 (225) ['The legislature's margin of appreciation when it comes to assessing the subsistence minimum corresponds to a reserved review of the provisions of non-constitutional law by the Federal Constitutional Court.']; ibid (258) ['According to the established case-law of the Federal Constitutional Court, the legislature does not have to retroactively remedy a legal state of affairs which is incompatible with the Basic Law if this runs counter to ordered financial and budgetary planning or if the constitutional law was previously not sufficiently clarified and the legislature is to be granted a suitable period to create new provisions for this reason (see BVerfGE 120, 125 (168) with further references). These principles also apply to the disputed benefits to ensure a subsistence minimum that is in line with human dignity.']

[1930] BVerfGE 125, 175 (226) ['[…] the material review as regards the result is restricted to whether the benefits are evidently insufficient [cited case omitted].']; ibid (231) ['It can also not be ascertained that the amount of Euro 207 that is uniformly applicable to children until completing the age of 14 is manifestly inadequate to ensure a subsistence minimum that is in line with human dignity.']

> material prerequisites for this are at the disposal of the person in need of assistance.[1931]

The inability to obtain an existence in line with human dignity can be portrayed as a deadlock situation. Deadlock amounts to foreclosure of the very possibility of self-determination. The elemental character of the needs corresponding to a subsistence minimum accounts for the ontological significance of practicing the law of human dignity in subsistence minimum case law. The law of human dignity opens up a possibility of breaking the deadlock and permitting the traversal of the limit. The disclosure of human being-ness denotes the practice of law's humanism, that is, according to Heidegger, the true sense of metaphysics. The state acts under the duty to protect human dignity and to deliver upon its social welfare responsibilities in guaranteeing availability of the material prerequisites for a dignified existence for those 'in need of assistance'. By analogy with the tasks of 'meditating and caring' discussed in the ontological account of human dignity[1932], the duty of the state under Art. 1 sec. 1 GG and Art. 20 sec. 1 GG expresses commitment to the humane practice of law, in other words the fostering of humanism.

It does not suffice, however, to defer to the duty of the state under Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG to protect those in need of assistance; the Court argued that a corresponding benefit claim is constitutionally imperative[1933]. It is the subjective right of the person in need of assistance that guarantees a dignified subsistence minimum. Voluntary benefits of the state or third parties cannot stand in for the legal and ontological significance of the concrete benefit claim[1934]. The claim *per se,* regardless of what it substantively and on an *ad hoc* basis involves, constitutes an instance of practice of the law of human dignity. The provision of a claim enables individual human beings' active, self-determined appeal to the law of human dignity. In other words, the constitutionally grounded claim is a forceful instrument in the hands of subjects of fundamental rights and the traversal of the limit by means of this legal tool provokes the irruptive movement associated with the *polemos,* that is, the state in which the ontology of things first appears. The direct constitutional benefit

[1931] BVerfGE 125, 175 (222)
[1932] Heidegger, 'Letter on Humanism' 239, 244
[1933] BVerfGE 125, 175 (222f.) ['A benefit claim of the holder of the fundamental right corresponds to this objective duty from Art. 1 sec. 1 GG, given that the fundamental right protects the dignity of each individual person [cited case omitted], and it can only be ensured in such emergency situations by means of material support.']
[1934] Wallerath (2008) 157, 161f.

claim to a guarantee of a subsistence minimum that is in line with human dignity abstractly, yet exhaustively, 'covers those means which are vital' to maintain a dignified existence, namely 'guarantees the whole subsistence minimum by a uniform fundamental rights guarantee'[1935] comprising both physical existence and a minimum of participation in social, cultural and political life. Abstraction and uniformity in practicing the constitutional guarantee are consistent with the non-concretization of the meaning of human being-ness, with 'something missing' as a quality of law's *Menschenbild* in light of the law of human dignity.

The FCC furthermore asserted that '[t]he guarantee of a subsistence minimum that is in line with human dignity must be safeguarded by a statutory claim.'[1936] According to the Court, '[t]his is directly demanded by the protection afforded by Art. 1 sec. 1 GG.'[1937] Why is a statutory claim necessary in addition to the constitutionally grounded claim?

> A person in need of assistance may not be referred to voluntary benefits of the state or of third parties whose provision is not guaranteed by a subjective right of the person in need of assistance. The constitutional guarantee of a subsistence minimum that is in line with human dignity must take place by a parliamentary statute which contains a concrete benefit claim on the part of the citizen towards the competent benefit institution. […] The benefit claim from Art. 1 sec. 1 GG is fundamentally provided by the constitution [cited case omitted]. However, the scope of this claim in terms of the types of needs and of the means necessary therefore cannot be directly derived from the constitution [cited case omitted].[1938]

The Basic Law arms the subjects of fundamental rights with a claim to the guarantee of a subsistence minimum in line with human dignity, which 'must be constitutionally guaranteed by legal claims'[1939]. The constitutional claim marks the initiation of litigious names opening up 'the space of a test of verification'[1940]. The statutory claim, namely the concretization of the constitutional guarantee by the legislature, constitutes one possible concrete response to verification attempts.

> […] This is also supported in other constitutional principles. The duty incumbent on the legislature to make the provisions material to the realization of the fundamental right itself already emerges from

[1935] BVerfGE 125, 175 (223)
[1936] BVerfGE 125, 175 (223)
[1937] BVerfGE 125, 175 (223)
[1938] BVerfGE 125, 175 (223f.)
[1939] BVerfGE 125, 175 (242)
[1940] Rancière, *Dissensus* (2010) 69

> the principles of the rule of law and of democracy [cited case omitted].[1941]

An ontological reading of the argument brought forth by the Court to justify the indispensability of a statutory claim, that is, 'a concrete claim on the part of the citizen' which is moreover addressed to a concrete 'competent benefit institution'[1942], manifests how humanism and pragmatism feed on each other in the practice of the fundamental right. Concretization serves pragmatic concerns, while at the same time allows for actual and effective practice, in other words prohibits rendering the claim void, a merely rhetorical device.

> If the legislature does not adequately meet its constitutional obligation to determine the subsistence minimum, the non-constitutional law is unconstitutional to the degree that it displays this shortcoming.[1943]

In that spirit the FCC noted the insufficiency of the Budget Act 'because the citizen is unable to derive any direct claims from this [cited case omitted].'[1944] Concretization by means of a statutory claim is a response to the open-endedness of those issues, and enables practicing the law of human dignity in a manner consistent with the commitment to humanism expressed in fundamental rights language.

ii. The *Menschenbild*: empty, multidimensional, and *ad hoc* concretized

The Basic Law refrains from adumbrating 'any precise figure'[1945] for the claim to a subsistence minimum in line with human dignity. Non-concretization, in that sense, runs parallel to the commitment to the dual sense of 'something missing' as an aspect of the *Menschenbild* of the Basic Law, namely an image that does not correspond to any specific manifestation of human being-ness, but rather remains open to *ad hoc* concretization. The fundamental right to the guarantee of a subsistence minimum in line with human dignity comprises not only the material prerequisites for human beings' physical existence[1946], but also a minimum of participation in social, cultural and political life, 'the possibility to maintain inter-human relationships'[1947].

[1941] BVerfGE 125, 175 (223)
[1942] BVerfGE 125, 175 (223)
[1943] BVerfGE 125, 175 (223f.)
[1944] BVerfGE 125, 175 (224)
[1945] BVerfGE 125, 175 (225f.) ['Since the Basic Law itself does not permit any precise figure to be put on the claim […]']
[1946] BVerfGE 125, 175 (225)
[1947] BVerfGE 125, 175 (223)

Spellbrink emphatically notes, 'Whoever speaks about human dignity, must at the same time clarify its *Menschenbild.*'[1948] In the *Subsistence Minimum Case* law's *Menschenbild* appears multidimensional. The multidimensionality of human being-ness is reflected in the first column of tables depicting the composition of the standard rate, where needs such as food, water, electricity, clothing, housing and healthcare are listed alongside transport, communication, education, leisure, entertainment and culture.[1949] The legislature's margin of appreciation in defining the needs that correspond to a person's physical existence is narrower than the latitude to define 'the nature and scope of the possibility to participate in social life.' [1950] Be that as it may, both kinds of needs are understood to be existential in the text of the *Subsistence Minumum Case*[1951].

A concrete portrayal of the *Menschenbild* ensues from the treatment of children's needs in the statute under scrutiny[1952], a concretization on which the Court shed new light. Are children human within the realm of law? Scrutinizing the parliamentary practice of the fundamental right in the case of children, the FCC, for instance, noted that '[a]n additional need is to be anticipated above all with school-age children.'[1953]. Emphasis on needs relevant to children's education[1954], not only signifies the *ad hoc* portrayal of law's *Menschenbild*, but also indicates the multidimensionality of human being-ness as manifested at the most elemental ontological level.

[1948] Spellbrink (2011) 661, 661f. [Spellbrink identifies two conflicting theoretical models that respond to this question: the *Mitgifttheorie* and the *Leistungstheorie*. In the context of labor, which according to Spellbrink has not been sufficiently addressed in the *Subsistence Minimum Case*, it does not follow from human dignity that human being must work; rather they have an unconditional right to a subsistence minimum. Workfare-philosophy would on the contrary formulate its dogma as follows: Whoever does not work, shall not eat.]

[1949] BVerfGE 125, 175 (193ff.)

[1950] BVerfGE 125, 175 (225)

[1951] The emphasis on ensuring that the additional needs of school children are covered through an adequate social benefit in line with the commitment 'to create a benefit system which completely guarantees the subsistence minimum' [BVerfGE 125, 175 (249)] witnesses the existential significance of participation in social, cultural and political life.

[1952] BVerfGE 125, 175 (245)

[1953] BVerfGE 125, 175 (246); ibid (252) ['As the Federal Government made it clear in the oral hearing, § 24a of the Second Book of the Code of Social Law is based on the idea that the school-related needs are not part of the subsistence minimum of a child to be ensured by benefits according to the Second Book of the Code of Social Law. As has already been stated, this is however not compatible with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG.']

[1954] BVerfGE 125, 175 (246) ['Necessary expenditure to comply with school obligations is part of their need in line with the subsistence minimum. Without covering these costs, children in need of assistance are threatened by being excluded from chances in life because they cannot successfully attend school without purchasing the necessary school material, such as school books, exercise books or calculators.']

> Children are not small adults. Their need, which must be covered in order to ensure a subsistence minimum that is in line with human dignity, must be orientated in line with child development phases and towards what is necessary for the development of a child's personality.[1955]

The FCC stressed the danger that the development of school-age children whose parents are entitled to receive benefits according to the Second Book of the Code of Social Law and the 'future capability to support themselves by their own efforts'[1956] could be undermined due to inadequate state benefits. Potentiality, an inherent quality of human being-ness, features centrally in the Court's critical reflection on children's needs. The notion of potentiality implicates 'something missing' and brings to mind how coming forth into the unhidden presupposes concealment. The evolution of children involves the traversal of limits and this process may be perceived as the progressive unveiling of human being-ness.

iii. The atypical in life and law, the building of cases of verification, and the reinforcement of dissensus as a process of critical reflection

Provision for 'needs occurring in special cases of a nature that is not recorded or which is atypical in its scope […]'[1957] evinces the Court's understanding of the law of human dignity apropos the atypical and unforeseeable, both allusions to 'something missing' as an inherent quality of human being-ness. The FCC noted that such needs were 'not authoritatively identified by the statistics.'[1958]

> The standard benefit cannot therefore cover them. Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG is however also required to cover a need which is irrefutable, recurrent and not merely a single instance if this is necessary in individual cases for a subsistence minimum that is in line with human dignity. [1959]

The 'atypical' signifies 'something missing', that is, something that comes forth unpredictably and urgently. Demanding provision for a claim to irrefutable, recurrent and not merely single-instance needs shows how the prescriptive[1960]

[1955] BVerfGE 125, 175 (246)
[1956] BVerfGE 125, 175 (246); See also ibid (247), under (cc) on the subsistence-related needs of children.
[1957] BVerfGE 125, 175 (254)
[1958] BVerfGE 125, 175 (254)
[1959] BVerfGE 125, 175 (254)
[1960] Value decisions are an indispensable trait of mobilization of human dignity langauge. Hoerster (1983) 93, 95 [distinction between descriptive meaning of terms such as 'life' or 'bodily integrity' and the 'dignity' of the human being which is necessarily subject to value decisions]

meaning of inviolability in the law of human dignity sets up an inscription that is particularly permitting of mobilization on the part of those who have no part[1961]. Accommodation of the 'atypical' requires availability of empty space within the realm of fundamental rights. It is the claim to a dignified subsistence minimum, as a tool of mobilization, that allows subjects of rights to make something of that inscription[1962], in other words to find a part within surplus names, introduce new surplus names or – in hermeneutic and literary fashion – portray new manifestations of human being-ness.

> It is also incompatible with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG that a provision is missing in the Second Book of the Code of Social Law which provides for a claim to benefits to ensure covering a subsistence minimum that is in line with human dignity which is irrefutable, recurrent and not merely a single instance. Such a claim is necessary for the needs which are not already covered by §§ 20 et seq. of the Second Book of the Code of Social Law because the income and consumption statistics on which the standard benefit is based only reflect the average requirements in customary needs situations, but not special needs going over and above this because of atypical needs. [1963]

The law of human dignity in conjunction with the principle of the social welfare state guarantees the availability of space for the establishment of – hermeneutically and literary understood – 'atypical' manifestations of human being-ness within the realm of its practice. The content and form of the space that corresponds to the part that has no part appear once the limit is traversed and human being-ness comes forth into the unhidden, namely becomes visible. The limit separates and delineates. *Ad hoc* determination of who the human being is, and, consequently, of the space occupied by this *Menschenbild* within the realm of law is attuned to the commitment to metaphysics, defined as humanism, in mobilizing fundamental rights in legal language games, and to the practice of the transcendental as an aspect of the meaning of the law of human dignity. The uniqueness of each metaphysical subject and of its viewpoint and world is affirmed in breaking with the – impersonal – average. Therefore, the fundamental right to a subsistence minimum in line with human dignity requires provision for special needs beyond 'the average

[1961] Rancière, *Dissensus* (2010) 35
[1962] ibid 68
[1963] BVerfGE 125, 175 (252)

requirements in customary needs situation', beyond the typified enumeration of subsistence needs.

'Something missing' as an aspect of the meaning of the law of human dignity enables and provokes ongoing reflection on who the human being is. The *a priori* institution of legal claims to cover cases that are presently unforeseeable[1964] reinforces the process of dissensus as a mode of critical reflection. The statement that '[t]he statutory benefit claim must be shaped such that it always covers the total needs necessary for the existence of each individual fundamental right holder [cited cases omitted]'[1965] and the Court's insistence on the decisiveness of acknowledging the individuality of human being-ness manifestations[1966] highlight commitment to *ad hoc* assessment and convey law's anthropocentricism. A fine example of such insistence is the clarification that 'each member of a joint household – including children – has an individual right to [the guarantee of a subsistence minimum that is in line with human dignity], and presumes a need that is absolutely necessary.'[1967] Meaning-giving empty box or black box metaphors and individuality as a trait of human being-ness are just two sides of a single coin.

Moreover, argued the Court, the concrete subsistence minimum in line with human dignity should be 'reviewed and refined on an ongoing basis'.[1968] The FCC underlined the importance of constant critical reflection on what the benefit claim entails 'because a person's elementary requirement for life can in principle only be

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[1964] Binder & Weisberg, *Literary Criticism of Law* (2000) 132 f. ['Gadamer treats all texts as canonical for some institution, dedicated as much to the preservation of its future viability as to the conservation of its past values. In this way Gadamer treats the legal text as the paradigm for all texts. The meaning of any text ultimately consists in its contemporary application to problems unforeseen when the text was generated. Nothing could be further from the view that textual meaning is fixed by authorial intent.']

[1965] BVerfGE 125, 175 (224); Binder & Weisberg, ibid 197 ['We can never resolve the meaning of justice once and for all, in abstraction from a particular society or social institution. This means that *whenever questions of justice arise* – which is to say whenever social choices are made – *the methods of the humanities are implicated*. We have to 'read' the society and its institutions anew, each time, and decide what reforms will best maintain or foster self-respect for these people, with these traditions, these institutions, these deep disagreements.']

[1966] BVerfGE 125, 175 (253) ['Having said that, Article 1.1 of the Basic Law, which protects the human dignity of each individual without exception, demands that the subsistence minimum is ensured in each individual case.']

[1967] BVerfGE 125, 175 (232)

[1968] BVerfGE 125, 175 (225); This requirement, which constitutes at once a criterion of soundness of justification in the interpretation of facts – minor premises – and the demonstration of their correspondence to the law – major premise – can be further enhanced by the remark '[…] by reminding us of the unpredictability of our future, hermeneutics paradoxically gives us a more accurate self-portrait and confronts us with our responsibility to make ourselves.' Binder & Weisberg (n 1964) 134, citing Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton Univ. Press, 1979) 373ff. [Edification, Relativism, and the Objective Truth]

satisfied at the moment when it arises'[1969]. The *supra* maxim indicates when 'something missing' is first identified. As argued in the ontological account, one becomes conscious of the empty space within the realm of fundamental rights in the *polemos*, when the human being first comes-into-being and asserts its human being-ness at the level of law.

Provision for the 'atypical' ensures state response to individual needs of persons requiring assistance beyond the statistical average case[1970] The FCC noted that '[t]he expenditure items and amounts which are relevant to standard benefits are conceived from the outset as abstract calculation values which do not have to be exactly correct for each person in need of assistance, but are only to guarantee in total a subsistence minimum that is in line with human dignity.'[1971] Grounding the incompatibility of the contested statute with the Basic Law in the neglect of atypical needs reaffirms the importance of practicing the law of human dignity in the spirit of critical reflection. Law influences decisively the authority of legal actors over the production of meaning; in MacKinnon's words 'law transforms perspective into being'. Law's meta-dimension understood as law's humanism is a beacon that signals the direction towards which the traversal of limits in accordance with the law of human dignity should lead. Critical reflection is the process inextricably linked with the possibility of humanism. Guaranteeing the humanism manifested in the law of human dignity calls for observing a process of critical reflection in practicing that law.

b. Linguistic-analytical

The linguistic-analytical portrayal of the practice of the law of human dignity in the *Subsistence Minimum Case* demonstrates the interplay between life and law and the engagement of the judge as the critical eye with authority over meaning in surveyance of the field of sight and the legal language game and in self-reflection. Both the fluctuation of the boundaries of the legal language game in the evolution of the Court's legal reasoning and the identification of atypical needs with 'something missing' in this analysis is premised on the contoured realms.

[1969] BVerfGE 125, 175 (225)
[1970] BVerfGE 125, 175 (253)
[1971] BVerfGE 125, 175 (253)

i. The interplay between life and law or between the field of sight and the legal language game: language as grounds for a relational account of human dignity, self-reflection, and surveyance

In linguistic analytical terms, Art. 1 sec. 1 GG guarantees that the viewpoint of metaphysical subjects is respected and protected and presupposes that this viewpoint is soundly portrayed in legal texts as aspects of practice, albeit the ultimate authority of legal actors, by analogy with the eye that looks through the lens of the law, over meaning.

> The state must also protect human dignity in positive terms [cited cases omitted]. […] A benefit claim of the holder of the fundamental right corresponds to this objective duty from Art.1 sec. 1 GG […].[1972]

The negative and positive determinations of human dignity meaning are mutually complementary. The inviolability of human dignity guaranteed in the Basic Law grounds the defensive character of the fundamental right on the one hand and positively defined state protection on the other. The benefit claim of the holder of the fundamental right corresponds to the state duty to protect human dignity. From a linguistic-analytical perspective, the claim to a subsistence minimum in line with human dignity affirms the central position of the metaphysical subject in the legal language game of the Court and reinforces the authority of an eye and viewpoint over meaning. As a claim directly emanating from looking through the lens of the Basic Law – specifically, the law of human dignity and the principle of the social welfare state – the benefit claim is signified as an embodiment of the dual sense of 'something missing': 'the scope of this claim in terms of the types of needs and of the means necessary therefore cannot be directly derived from the constitution'[1973]. How did the FCC confront the emptiness consequent on the impossibility of directly deducing the concrete meaning of this claim from constitutional law?

> [The scope of this claim] depends on society's views of what is necessary for an existence that is in line with human dignity, and on the concrete circumstances of the person in need of assistance, as well as on the respective economic and technical circumstances, and

[1972] BVerfGE 125, 175 (222f.)
[1973] BVerfGE 125, 175 (224)

> is to be specifically determined by the legislature in accordance with them […].[1974]

The FCC enriched the content and, thereby, expanded the boundaries of the legal language game in the *Subsistence Minimum Case* by resorting, first, to the viewpoint of society re 'what is necessary for an existence that is in line with human dignity'; second, to the viewpoint and field of sight of the metaphysical subject, that is, the 'concrete person in need of assistance'; third, to information within the Court's broader field of sight re economic and technical circumstances as portrayed in the legal language game produced by the responsible state power, the legislature.[1975] What is the role of the FCC in view of the recognition of the authority of other eyes and their viewpoint over the meaning of a subsistence minimum in line with human dignity?

The FCC, looking through the lens of the Basic Law, sought to ascertain whether the amount of the standard benefit is evidently insufficient[1976], and whether the sources of data and the methods employed for estimating this amount in lawmaking were appropriate and consistent. The Court found the procedure followed by the legislature in determining the standard benefit, 'which forms the basis for other standard benefit amounts', to be 'fundamentally suitable to realistically assess the benefits necessary to ensure a subsistence minimum that is in line with human dignity.'[1977] The 'realistic' estimation of standard benefits that sufficiently cover the dignified subsistence minimum is of utmost importance. The selected methodology and the calculated outcomes are constitutional as long as they realistically guarantee that minimum. Such language affirms the value of the interplay between law and life, that is, the relevance of the legal language game to the broader field of sight.

> Since it is not possible to establish that the standard benefit amounts fixed by law are evidently insufficient, the legislature is not directly obliged under constitutional law to set higher benefits. It must, rather, implement a procedure to realistically ascertain the benefits needed in line with needs which are required to ensure a subsistence minimum that is in line with human dignity and in line with the indicated constitutional prerequisites and entrench its outcome in law as a benefit claim.[1978]

[1974] BVerfGE 125, 175 (224)
[1975] BVerfGE 125, 175 (224)
[1976] Spellbrink (2011) 661, 663f.
[1977] BVerfGE 125, 175 (232)
[1978] BVerfGE 125, 175 (256)

Different models of calculation employed in lawmaking of social welfare law, such as the basket-of-goods or the consumption-related method, were juxtaposed and comparatively evaluated by the FCC. Commenting on the models, the Court demonstrated surveyance and comprehension of the methods employed in lawmaking; no constitutional reasons for preferring the one model over the other were found[1979]. The juxtaposition of the two models unveils aspects of law's *Menschenbild* in the *Subsistence Minimum Case*. Clearly, physical survival and participation in social life are equally existential in light of the guarantee of human dignity in law[1980]. Likewise, the subdivision of children in need of assistance 'into two age groups until completing the age of 14 and from 14 to completing the age of 18'[1981], and, consequently, the differentiation of benefits for each subgroup in the OECD scale[1982] was considered insufficiently justified. The Court explained the function of the OECD scale and criticized its utilization in the reasoning of the Standard Rate Ordinance, focusing mainly on the issue of failing to address the particular needs of children.

> […] the OECD scale does not provide any information on the needs of children in different age groups. It says nothing about which benefits are necessary to ensure the subsistence minimum of a child that is in line with human dignity, and especially not why the needs of children until completing the age of 14 should be 60 % of the needs of a single person.[1983]

The FCC identified the legislature as the critical eye and viewpoint for making the 'valuing decision as to what expenditure is counted among the subsistence minimum', yet 'in an expedient, justifiable manner.'[1984] The role of the FCC, as portrayed here, is to steer the legislature in producing its own legal language game. For instance, the FCC demanded an empirical basis of justification for reductions in expenditure items; directed the legislature to 'only regard expenditure which is made by the reference group as not relevant if it is certain that it is covered elsewhere or is not necessary to secure one's livelihood'[1985]; and required the deduction of the

[1979] BVerfGE 125, 175 (187f.)
[1980] BVerfGE 125, 175 (235) ['The statistical and consumption method indeed has the advantage as against the basket of goods method that it does not determine the subsistence minimum which goes beyond physical survival by using individual selected needs items, but measures the expenditure additionally necessary to guarantee a minimum of participation in society, in addition to the physical subsistence minimum, by virtue of actual expenditure conduct.']
[1981] BVerfGE 125, 175 (246)
[1982] BVerfGE 125, 175 (246)
[1983] BVerfGE 125, 175 (247)
[1984] BVerfGE 125, 175 (237)
[1985] BVerfGE 125, 175 (237)

amount of a reduction from a 'reliable' survey. With respect to the latter point, the FCC added, '[a]n estimate on a sound empirical basis is not ruled out here; "random" estimates however run counter to a procedure of realistic investigation, and hence violate Art. 1 sec. 1 GG in conjunction with the principle of the social welfare state contained in Art. 20 sec. 1 GG.'[1986] Language such as 'expedient', 'justifiable', 'empirical', 'not relevant', 'reliable', 'sound', 'random', 'realistic investigation' composes the linguistic-analytical portrayal of practicing the law of human dignity in the *Subsistence Minimum Case*. The emphasis on methodological soundness and careful delineation of the viewpoint and scope of the field of sight of another state power are indications of the effort of the constitutional judge to *de facto* guarantee human dignity in the context of social welfare.

> To make it possible to examine whether the valuations and decisions taken by the legislature correspond to the constitutional guarantee of a subsistence minimum that is in line with human dignity, the legislature handing down the provision is subject to the obligation to reason them in a comprehensible manner; this is to be demanded above all if the legislature deviates from a method which it has selected itself. [1987]

The constitutional judge, the eye looking at life through the lens of the Basic Law, created expectations re the content and form of 'the valuations and decisions taken by the legislature' in order 'to make it possible to examine' compatibility with the constitutional guarantee of a subsistence minimum in line with human dignity. The first expectation is of pertinence to the content of the valuations and decisions generating social benefit provisions: the legislature has a duty 'to reason them in a comprehensible manner', especially if it 'deviates from a method which it has selected itself.' The logical form of valuations and decisions should be 'shown' consistently in the respective legal propositions. The second expectation concerns the form of the syllogism comprising valuations and decisions: as connoted by the phrases 'to make it possible to examine' and 'in a comprehensible manner', reasoning needs to be demonstrable, thus 'said', expressed in propositions. Only in that form can the meaning produced be comprehensible and subject to examination. These expectations are prerequisites to the examination of valuations and decisions, namely precede the assessment of the constitutionality of concrete statutory provisions.

[1986] BVerfGE 125, 175 (237f.)
[1987] BVerfGE 125, 175 (238)

What is the significance of this observation? Both expectations raised operate at the level of language. Reasoning and rendering syllogisms accessible to those entrusted with examining them in accordance with the Basic Law are foundational to the very possibility of constitutional review. The relational account of humanism is instituted in language. Portrayal through language in compliance with the rules of demonstration and justification in legal language games precedes reflection and judgment on a given case. This insight is enhanced *infra* in the phenomenological analysis of the *Subsistence Minimum Case*.

School-related needs present a prime example of how the assumed viewpoint of children as a particular concretization of law's *Menschenbild* is portrayed by a third viewpoint, that of the constitutional judge, in a legal language game. In the legal language game of the Federal Government, which was first created in the oral hearing and is integrated into the legal language game of the FCC, we find that the relevant statutory provision 'is based on the idea that school-related needs are not part of the subsistence minimum of a child to be ensured by benefits according to the Second Book of the Code of Social Law'[1988] Looking through the lens of the law of human dignity and the principle of the social state, the FCC found this position incompatible with Art. 1 sec. 1 GG and Art. 20 sec. 1 GG and criticized the lack of empirical ascertainment of school-related needs of a child in the drafting of the adopted provision by the legislature. In linguistic-analytical terms, the Court questioned how school-related needs are determined and portrayed in the legal language game produced by the legislature. Specifically, it challenged the sufficiency of the extent to which insights from the broader field of sight, life, were drawn on to enhance the relevance and soundness of that legal language game. The 'free', namely random, estimation of amounts is not constitutionally acceptable.[1989] Both viewpoints illustrated in the legal language game of the *Subsistence Minimum I Case* fail to address the particularities of children's needs, in other words to adequately portray this concretization of law's *Menschenbild.*

[1988] BVerfGE 125, 175 (252)

[1989] BVerfGE 125, 175 (252) ['Neither the reasoning of the draft Family Services Act, nor the statement of the Federal Government, indicate how the amount of Euro 100 per year is composed; it was obviously estimated freely.']

ii. Fluctuation of the boundaries of the legal language game: negative delineation

In working out the breadth of the boundaries of the legal language game, the Court engaged in negative delineation, that is, identified parameters that could be confused as relevant to the assessment of the standard benefit, and excluded them from the scope of the legal language game. For instance, the FCC noted that '[t]he current pension value […] does not serve to quantify the benefits necessary to ensure a subsistence minimum that is in line with human dignity and to extrapolate the change in the need annually […]'[1990], and 'hence [was] not suited to realistically extrapolate the subsistence minimum.'[1991] At the same time, the FCC drew parallels to the standard benefit argumentation for deriving benefits such as social benefits for partners living together in a joint household and children. With respect to the social benefit for children, the Court moreover found the method employed for the determination of the subsistence minimum of a child until completing the age of 14 unjustifiable[1992].

This mode of reasoning could be portrayed as a fluctuation of the boundaries of the legal language game, namely an expansion followed by a contraction. The contraction process is meant to clarify meaning by opening up a field of dispenses. Eventually, the narrower legal language game comprises the distillation of the produced meaning in accord with the viewpoint of the constitutional judge and the Basic Law as the critical lens through which this legal actor looks at life.

iii. The atypical and the dual sense of 'something missing'

Surveying the statutory legal language game through the lens of the law of human dignity and the principle of the social welfare state, the FCC noticed the absence of provision for 'a claim to benefits to ensure covering a subsistence

[1990] BVerfGE 125, 175 (243); ibid ['Rather, it is intended to steer and slow pension payments in accordance with general economic factors, maintaining the liquidity of the pensions insurance institutions, as well as considering the relationship of active employees to recipients of old-age pensions, and serving to guarantee equitable participation in a pay-as-you-go system. Linking the current pension value to developments in gross wages reflects developments in prosperity within society to a certain degree. Developments in gross wages are however unable to provide any information on changes in the necessary needs to cover the subsistence minimum. The factors named in § 68 sec. 1 sent. 3 nos. 2 and 3 of the Sixth Book of the Code of Social Law and in § 255e of the Sixth Book of the Code of Social Law do not refer to the subsistence minimum. However, the factors which determine the consumption conduct of the lowest quintile, which is relevant to the calculation of the standard benefit, namely the available net income and price developments, do not play a role in the determination of the current pension value.']
[1991] BVerfGE 125, 175 (243)
[1992] BVerfGE 125, 175 (231)

minimum that is in line with human dignity which is irrefutable, recurrent and not merely a single instance'[1993] in the Second Book of the Code of Social Law. This lacuna in the contested statute brought about incompatibility with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG. The statutory lacuna can be associated with the dual sense of 'something missing'. Besides reflecting commitment to the realistic determination of a subsistence minimum in line with human dignity, atypical needs articulate that which is not representative of a type and indicate the unforeseeable. Both the atypical and the unforeseeable are aspects of human being-ness, thus of pertinence to the position of the metaphysical subject in the introduced model, namely at the limit of the world. The practice of the law of human dignity is evidenced in the acknowledgment of the 'atypical' and of the guarantee of empty space within the legal language game for *ad hoc* requisites exceeding 'the average requirements in customary needs situations […]'[1994], that is, for filling a *Leerstelle* or 'something missing' *in concreto*. In linguistic-analytical terms, law's humanism is manifested in zooming in on metaphysical subjects and demonstrating an effort to realistically, qualitatively and quantitatively, assess their needs. The 'atypical' is a feature of the *Menschenbild* in light of the law of human dignity.

Arrangements and calculations that generalize and globalize the needs falling under a dignified subsistence minimum in the legal language game of the legislature are constitutionally 'in principle permissible'[1995]. Be that as it may, the *ad hoc* assessment of the needs of each individual human being is an integral aspect of the meaning of practicing the law of human dignity.

> Needs occurring in special cases of a nature that is not recorded or which is atypical in its scope are not authoritatively identified by the statistics.[1996]

Providing those in need of assistance with a lump sum and expecting them to administer the allocation of this amount according to their needs was deemed acceptable by the Court. This model furthers freedom as an aspect of social welfare

[1993] BVerfGE 125, 175 (255)
[1994] BVerfGE 125, 175 (252)
[1995] BVerfGE 125, 175 (253); ibid (252f.) ['The granting of a standard benefit as a fixed amount is in principle permissible. When systemizing mass manifestations, the legislature may make generalizing, globalizing arrangements [cited cases omitted]. This also applies to benefits to ensure a subsistence minimum that is in line with human dignity. Having said that, Art. 1 sec. 1 GG, which protects the human dignity of each individual without exception, demands that the subsistence minimum is ensured in each individual case.']
[1996] BVerfGE 125, 175 (253f.)

law and may be viewed as conveying an understanding of human beings as self-determined, hence self-responsible, individuals.[1997] The lump sum reflects, noted the Court, only the average needs of 'the statistical mean of the reference group'[1998] in view of a sample survey on income and expenditure. For this reason, the FCC held that 'an additional claim to benefits is still required in cases of need, which is irrefutable, recurrent and special, and not merely a single instance, to cover a subsistence minimum in line with human dignity.'[1999] This additional claim was narrowly defined.[2000]

c. Phenomenological

Themes developed in Chapter One and traced in the phenomenological portrayal of the practice of the law of human dignity in the *Subsistence Minimum Case* are the institution of the relation between the self and the other on language, fraternity and solidarity, and the need for both infinity and totality traits in practicing the law humanely, exceptionally encountered in the practice of the law of human dignity.

[1997] BVerfGE 125, 175 (253) ['That the total is composed of statistically recorded expenditure in the individual divisions of the sample survey on income and expenditure does not mean that each person in need of assistance must always have the individual expenditure items and amounts at their disposal without restriction. Rather, it is a feature of the statistical model that the individual needs of a person in need of assistance may derogate from the statistical average case. The expenditure items and amounts which are relevant to standard benefits are conceived from the outset as abstract calculation values which do not have to be exactly correct for each person in need of assistance, but are only to guarantee in total a subsistence minimum that is in line with human dignity. If the statistical model is applied in line with the constitutional prerequisites and the lump sum in particular has been determined such that various needs can be balanced out […], the person in need of assistance may as a rule organize his or her individual consumption conduct in such a way as to manage on the fixed rate; in case of special need, he or she will, above all, have to resort to the potential for saving up that is contained in the standard benefit.']; See also Spellbrink (2011) 661, 664 ['Dass die pauschalierte Regelleistung völlig zur freien Verfügung des Empfängers steht, ist auch ein freiheitsfördernder Aspekt des SGB II.']

[1998] BVerfGE 125, 175 (254)

[1999] BVerfGE 125, 175 (254)

[2000] BVerfGE 125, 175 (255) ['It only occurs if the need is so great that the total amount of the benefits granted to the person in need of assistance – including the benefits of third parties and taking account of potential savings of the person in need of assistance – no longer guarantees a subsistence minimum that is in line with human dignity. In view of its narrowly defined, strict prerequisites, this additional claim is likely to arise in rare cases only.']

i. Language vis-à-vis the unity of a genus: the institution of human community in fraternity and solidarity

Whereas, on first reading, the *Subsistence Minimum Case* may appear centered on the natural 'foundations' of sameness[2001], namely the, indeed existing[2002], biological sameness or the common substance[2003] of human beings, this phenomenological analysis traces and demonstrates how practicing the law of human dignity, even to the ends of guaranteeing an elemental subsistence minimum to all, entails the relational construing of human being-ness and can be understood to be premised on the proposition that human community is 'instituted by language'[2004], rather than 'the unity of a genus'[2005]. The phenomenological portrayal of human being-ness in light of the concepts of fraternity and solidarity[2006] in *Totality and Infinity* rejects resemblance as the basis of the relation among human beings. In grounding the relation on resemblance or origin in 'a common cause of which they would be the effect […]'[2007], Levinas discerns mysterious participation[2008] in a causality, hence subsumption under a totality. The more opaque and 'mysterious'[2009] the premises of sameness, the more intensely the implications of the totality implied by biological resemblance, for instance bracketing and stereotyping, might appear. Biological sameness cannot become a pretext for letting the particularities of *ad hoc* cases slide. In practicing the law of human dignity in the *Subsistence Minimum Case*, the reasoning of the FCC appeared attuned to the pre-ethics in *Totality and Infinity*.

The subjective scope of Art. 1 sec. 1 GG comprises all human beings,[2010] regardless of citizenship status, intellectual maturity, capability for communication or

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[2001] Heidegger, 'On the Essence and Concept of Φύσις in Aristotle's Physics' 183, 229 ['[…] the "nature" of the human being, by which we do not mean the natural "foundations" (thought of as physical, chemical, or biological) but rather the pure and simple *being and essence* of those beings.']
[2002] Levinas, *Totality and Infinity,* 213 ['There does indeed exist a human race as a biological genus, and the common function men may exercise in the world as a totality permits the applying to them of a common concept.']
[2003] Wittgenstein, *Tractatus,* (2.024) ['Substance is what exists independently of what is the case.']; ibid (2.025) ['It is form and content.']
[2004] Levinas (n 2002) 213
[2005] ibid 214
[2006] Wallerath (2008) 157, 158 [the social state and solidarity, vulnerability, empathy]
[2007] Levinas (n 2002) 214
[2008] ibid
[2009] ibid
[2010] 'Die Würde "des", also jedes Menschen ist geschützt.' Kunig, Art. 1, *GG Kommentar* (2012) para 11; Cf. Ernst Benda, 'Menschenwürde und Persönlichkeitsrecht' in Ernst Benda, Werner Maihofer & Hans-Jochen Vogel (eds), *Handbuch des Verfassungsrechts* (§ 6, 2nd edn, Berlin – New York: 2004) 161, 166; Stern (1983) 627; Otto (2005) 473, 477f.; Winfried Hassemer, 'Über den argumentativen Umgang mit der Würde des Menschen' (2005) *EuGRZ* 300ff.

awareness, or even consciousness of one's human dignity.[2011] In all other texts presently under scrutiny – save the reference to the subsistence minimum of prisoners in the *Life Imprisonment Case* – the dual sense of 'something missing' manifests and, at the same time, accommodates the otherness of human being-ness; in the *Subsistence Minimum Case* it principally accommodates their sameness. Whether the FCC proves able to respond to the other rests first of all on how it defines sameness. Be that as it may, the meaning of sameness cannot establish a *status quo* in view of the emptiness of the *Menschenbild*. Beyond the definition of sameness, the law of human dignity and the need for *ad hoc* concretizations of law's *Menschenbild* in practicing that law require inquiry into the validity, in actuality, of the definition.

ii. Self-reflection and responsibility

In the *Subsistence Minimum Case* the Court assumed the role of guiding and directing the legislature in the field to be surveyed, the suitability of selected procedures and methods for assessing the subsistence minimum in line with human dignity, and the measures to be taken[2012]. Examining 'whether the legislature has covered and described the goal to ensure an existence that is in line with human dignity in a manner doing justice to Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG' concretely means scrutinizing 'whether within its margin of appreciation it has selected a calculation procedure that is fundamentally suited to an assessment of the subsistence minimum', in other words 'whether it has completely and correctly ascertained the necessary facts' and 'kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles.'[2013] The delineation of the object which is subject to review reveals qualities of a responsible response: the limits of the margin of appreciation must be observed, minding that the scope of legal actors' ability, as the self, to respond to the other is decisively determined by law, that is, the critical lens before the constitutional judge's eye; the calculation procedure must be suitable and appropriate; and, finally, procedures and methods must be justifiable and consistently applied.

[2011] Kunig ibid
[2012] BVerfGE 125, 175 (225) ['[…] The legislature must therefore take measures to react promptly to changes in the economic framework, such as price increases or increases in consumer taxes, in order to ensure at all times that the actual needs are met, in particular if it makes provision for a fixed amount, as in § 20 sec. 2 of the Second Book of the Code of Social Law.']
[2013] BVerfGE 125, 175 (226)

> Within the material bandwidth left by [the] review of evident errors, the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity cannot provide any quantifiable requirements. However, it requires a review of the basis and of the method of the assessment of benefits in terms of whether they do justice to the goal of the fundamental right. The protection of the fundamental right therefore also covers the procedure to ascertain the subsistence minimum because a review of results can only be carried out to a restricted degree by the standard of this fundamental right. In order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.[2014]

The requirement of justifiability calls for further scrutiny in view of its pertinence to the *modus operandi* of constitutional review and the principle of the separation of powers. Alexy notes, 'the claim to justifiability does not include a claim to the effect that the speaker him or herself is capable of giving a justification.'[2015] The speaking self can demonstrate the ability to respond by identifying who is 'capable of justifying what has been said.'[2016] Indicating who is competent to responsibly produce meaning 'can be regarded as a justification argument'[2017]; 'like every other argument'[2018], it is open to critical reflection and discussion.

The FCC noted how 'the legislature's margin of appreciation' corresponds to 'the reserved review of the provisions of non-constitutional law by the FCC.'[2019]

> Since the Basic Law itself does not permit any precise figure to be put on the claim, the material review as regards the result is restricted to whether the benefits are evidently insufficient […].[2020]

The principle of the social welfare state 'grants to the legislature the mandate to ensure a subsistence minimum for all that is in line with human dignity […]'[2021] The law of human dignity constitutes the foundation of the claim to a subsistence minimum.[2022] The major premise of the Court's legal syllogism is composed of the

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[2014] BVerfGE 125, 175 (226)
[2015] Alexy, *A Theory of Legal Argumentation* (1989) 192
[2016] ibid 192
[2017] ibid
[2018] ibid
[2019] BVerfGE 125, 175 (225)
[2020] BVerfGE 125, 175 (225f.)
[2021] BVerfGE 125, 175 (222)
[2022] BVerfGE 125, 175 (222) ['Art. 1 sec. 1 GG establishes this claim.']; See Spellbrink (2011) 661, 664 [The first commentaries on the procedural law consequences of the *Subsistence Minimum Case* argued that the decision of the FCC postulated a legal claim at the level of a subjective-public right to

fundamental right to the guarantee of a subsistence minimum that is in line with human dignity derived from Art. 1 sec. 1 GG in conjunction with the principle of the social welfare state contained in Art. 20 sec. 1 GG on the one hand, and the law of human dignity on the other.

> As a guarantee right, this fundamental right from Art. 1 sec. 1 GG takes on autonomous significance, in its conjunction with Art. 20 sec. 1 GG, in addition to the right from Art. 1 sec. 1 GG to respect for the dignity of each individual, which has an absolute effect. Fundamentally, it is not subject to the legislature's disposal and must be honored; it must however be lent concrete shape, and be regularly updated, by the legislature, which has to orientate the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life. It has latitude in bringing about this state of affairs. [2023]

The legislature is given a margin of appreciation in performing 'the unavoidable valuations'[2024] involved in the concretization of the objective scope of the guarantee to a subsistence minimum in line with human dignity[2025]. The requirements of concrete shaping and regular updates of the meaning of the fundamental right by the legislature underline that only the *ad hoc* appreciation of what satisfies a subsistence minimum in line with human dignity ensures a responsible response. What ensues from this observation is that commitment to the face-to-face encounter with the other, those in need of assistance, is an indicator of responsibility. A literary approach to the portrayal of the other in the case under scrutiny evokes directly vulnerability as in *Totality and Infinity* and the notion of morality, which has been paralleled to human dignity. Vulnerability and morality are, thus, motifs in the phenomenological portrayal of the *Subsistence Minimum Case*.

How is responsibility, namely the ability to respond, actually practiced as conveyed by the text of the *Subsistence Minimum Case*? The claim ensuing from the

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rational lawmaking. The lawmaker is responsible not only for a law providing for the subsistence minimum, but also, what is more, for a good law. This raises, according to Spellbrink, two questions: First, is this requirement valid only for the subsistence minimum regulations or for all decision-making by the legislature? Can this requirement be transposed to other fields of law? Second, is the requirement of transparency valid in all parts of the process of lawmaking in the field of social welfare law?]

[2023] BVerfGE 125, 175 (222)

[2024] BVerfGE 125, 175 (222)

[2025] The requirement of a good law for guaranteeing a subsistence minimum in line with human dignity alludes to the problematization of restraining the law in Gadamer, *Truth and Method* (1975, 2004) 316 ['In a certain instance he [the person "applying" law] will have to refrain from applying the full rigor of the law. But if he does, it is not because he has no alternative, but because to do otherwise would not be right. In restraining the law, he is not diminishing it but, on the contrary, finding the better law.']

fundamental right to a subsistence minimum in line with human dignity, besides signifying hospitality, renders a responsible answer to the other within the constitutional order of the Basic Law possible. The Court guides the legislature as to the features that compose a responsible answer, and this activity may be perceived as a manifestation of the Court's ability to respond to the other within its constitutionally determined scope of authority over meaning; this kind of response mirrors at once the competence and responsibility of the speaking self in the *Subsistence Minimum Case*. The Court directed the legislature to assess all expenditure necessary to guarantee a subsistence minimum in line with human dignity realistically, comprehensively, in a transparent and expedient procedure, and using reliable figures and plausible methods of calculation. A responsible response incorporates the findings of a reality check; requires thorough and exhaustive surveyance of the field of sight, that is life – not just law; should transparently articulate the world expanding before the eye of the self, so that this can effectively be shared in generosity towards the other; should be expedient in view of the urgency and importance of the needs corresponding to a subsistence minimum; and should be methodologically sound in terms of the sources and methods it employs.

> To lend concrete form to the claim, the legislature has to assess all expenditure that is necessary for one's existence logically and realistically in transparent and expedient proceedings according to the actual needs […]. To this end, it must initially assess the types of need, as well as the costs to be expended for them, and on this basis must determine the amount of the overall need. The Basic Law does not prescribe to it a specific method for doing so […]; it may, rather, itself select the method within the bounds of aptitude and expedience. Deviations from the selected method however require a factual justification. [2026]

The requirement of realistic assessment originates in the principle of the social welfare state in Art. 20 sec. 1 GG. The legislature is under a duty 'to cover social reality in a manner appropriate to the present day and realistic with regard to the guarantee of the subsistence minimum that is in line with human dignity, which for instance is very different in a technological information society than was previously the case.'[2027] Society is depicted as a – collective – evolving self. The FCC demanded

[2026] BVerfGE 125, 175 (225)
[2027] BVerfGE 125, 175 (223)

that law trails society in its evolution.[2028] Changing social context affects the meaning produced, the language games we play, the words that appear in legal language games and the portrayal of the self, the other and their relation.

Transparency facilitates constitutional review.[2029] The FCC noted that the legislature is under a duty 'to disclose the methods and calculations used to determine the subsistence minimum in the legislative procedure'[2030]. Failing to do so 'adequately'[2031] would result in incompliance of the ascertained subsistence minimum with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG. The FCC can evaluate the adequacy of transparency demonstrated in selecting and applying methods and calculation procedures to lawmaking on social welfare issues. Transparency enhances the articulation of the world by the self and, thereby, its sharing with the other. Striving for transparency intimates commitment to the pre-ethics of hospitality in practicing language. At the same time, transparency can be associated with the totalizing panoramic sense of vision in *Totality and Infinity*. The argument furthered by the FCC affirms the value of totality qualities in practicing the law. What is more, transparency as a totality quality amplifies the elucidation of meaning shared and effectively fosters the existence of an intersubjective space within the realm of law, that is, enhances infinity and advances the practice of law's meta-dimension.

> By means of the standard benefit paid to secure one's livelihood according to the Second Book of the Code of Social Law, the legislature has however, fundamentally, correctly defined the goal to guarantee a subsistence minimum that is in line with human dignity […]. […] [The legislature] however departed from this in various respects in the assessment of the standard benefit of €345, without replacing it with other recognizable or viable criteria […]. This also leads to the unconstitutionality of the derived benefits […][2032]

The FCC held that the provisions submitted for constitutional review were incompatible with Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG. In the Court's view, the statute did not mirror the ability of the legislature to respond to the

[2028] BVerfGE 125, 175 (223) ['The evaluations which are necessary here are a matter for the parliamentary legislature. It is obliged to lend concrete form to the benefit claim in fact and in legal consequences. It is fundamentally left up to the legislature to determine whether it ensures the subsistence minimum by means of monetary benefits, benefits in kind or services. It also has a margin of appreciation in determining the scope of the benefits to secure one's livelihood.']
[2029] BVerfGE 125, 175 (226)
[2030] BVerfGE 125, 175 (226)
[2031] BVerfGE 125, 175 (226)
[2032] BVerfGE 125, 175 (227)

other[2033]. Justifying the latitude of the legislature to determine the subsistence minimum in line with human dignity and concretize it by means of statutory regulation by reason of the democratic pedigree of this prong of state power spurs critical reflection. Was the decision of the FCC in the *Subsistence Minimum Case* aligned with democratic theory?[2034] Criticism boils down to whether, or to what extent, the response to the other and the treatment of the subject matter are defined by political process.[2035]

iii. Tracing totality and infinity: discussion of the benefit claim

The Court stressed the duty of the state, 'within its mandate, to protect human dignity and to ensure, in the implementation of its social welfare state mandate, that the material prerequisites for this are at the disposal of the person in need of assistance […]'[2036], that is, the vulnerable[2037]. The vulnerable human being is portrayed as the one who 'does not have the material means to guarantee an existence that is in line with human dignity because he or she is unable to obtain it either out of his or her gainful employment, or from own property or by benefits from third parties.'[2038]

> A benefit claim of the holder of the fundamental right corresponds to this objective duty from Art. 1 sec. 1 GG, given that the fundamental right protects the dignity of each individual person […], and it can only be ensured in such emergency situations by means of material support.[2039]

In light of the phenomenological account of the law of human dignity, the benefit claim of the holder of the fundamental right can be construed as a manifestation of the pre-ethics of hospitality[2040]. The recognition of a benefit claim

[2033] Wallerath (2008) 157, 160 [the need for concretization of the principle of the social state by the legislator springs from the 'social' *telos* of the state and the 'democratic' structural decision in the Basic Law]
[2034] See Daniela Piana, 'Beyond Judicial Independence: Rule of Law and Judicial Accountabilities in Assessing Democratic Quality' (2010) 9 *Comparative Sociology* 40 [The author questions the extent to which judicial independence can sufficiently illuminate as a concept the actions of judges in judicial practice. Taking into account that judicial governance is influenced by the multilevel constitutionalism reality of today, the author explores the relation between reconstructions of judicial governance and the democratic quality of decisions.]
[2035] Spellbrink (2011) 661, 665
[2036] BVerfGE 125, 175 (222)
[2037] Levinas, *Totality and Infinity*, 245
[2038] BVerfGE 125, 175 (222)
[2039] BVerfGE 125, 175 (222f.)
[2040] Levinas (n 2037) 300; See Derrida, *Adieu to Emmanuel Levinas* (1999)

that corresponds to the duty of the state to guarantee a subsistence minimum in line with human dignity essentially means welcoming the other, in his or her absolute otherness, to exercise their own authority over meaning. The practice of the law of human dignity in the *Subsistence Minimum I Case* involves, to a considerable extent, language that – at least on first reading – alludes to sameness. The contrast of sameness with portrayals of absolute otherness in the text is, therefore, only intensified in this phenomenological reading. Guaranteeing the benefit claim is tantamount to giving the other a voice, that is, welcoming the other to dominate the self, giving the other a right over the egoism of the self, who would otherwise, as a totalizer, egoistically assume who the other is. The other can mobilize the benefit claim and articulate his or her world. Real conversation opens up an intersubjective space within the totality structure of the legal language game. Generosity on the part of the self consists in the self affording the other the means through which the former can be dominated.

> The direct constitutional benefit claim to a guarantee of a subsistence minimum that is in line with human dignity only covers those means, which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses [*umfasst*] both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health […], and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life, given that humans as persons of necessity exist in social relationships […].[2041]

The institution and practice of a fundamental right to a subsistence minimum in line with human dignity in order to guarantee this dignified minimum suggests the need for totality traits in the practice of law. The guarantee 'encompasses', in the panoramic sense of vision[2042], and assumes a comprehension of the needs related to both physical existence and inter-human relationships. The qualities of law portrayed in the above excerpt make up a totality story. As shown *infra*, however, the dual sense of 'something missing' or infinity features in the Court's argumentation on special needs and their inclusion in the objective scope of the fundamental right to a subsistence minimum in line with human dignity.

[2041] BVerfGE 125, 175 (223)

[2042] Levinas (n 2037) 34; ibid 295 ['For vision is essentially an adequation of exteriority with interiority: in it exteriority is reabsorbed in the contemplative soul and, as an *adequate idea,* revealed to be a priori, the result of a *Sinngebung*.']

This guarantee 'must be safeguarded by a statutory claim' in line with 'the protection afforded by Art. 1 sec. 1 GG.'[2043] The other, the one 'in need of assistance' [*Hilfbedürftiger*][2044], shall not rely on voluntary benefits of the state or third parties 'whose provision is not guaranteed by a subjective right'[2045]. By demanding not only that elemental needs are covered, but, most importantly, that individuals can claim a response to their needs, the state as the self encounters the vulnerable other with responsibility, generosity, fraternity and solidarity, while leaving his or her absolute otherness intact and, what is more, empowering rather than simply assisting the other.

The parliamentary statute through which the constitutional guarantee is to be practiced must provide for a concrete benefit claim 'on the part of the citizen towards the competent benefit institution […]'[2046]; this duty 'already emerges from the principles of the rule of law and democracy.'[2047]

> This particularly applies if and to the degree that it is a matter of ensuring human dignity and human existence [cited cases omitted].[2048]

Commitment to *de facto* ensuring that the other can exercise the benefit claim is evinced in the Court's rebuttal of conceivable alternatives, such as the Budget Act, on the grounds of their insufficiency as foundations for the benefit claim, precisely 'because the citizen is unable to derive any direct claims'[2049] from them.

> What is more, the margin of appreciation that is afforded to Parliament by the constitution may only develop and take on concrete form in the context of a statute […].[2050]

How can the requirement of embodiment in statutory provisions of the concrete content of the constitutional guarantee of a subsistence minimum in line with human dignity be understood in light of phenomenological insights in Chapter One? In the text of the *Subsistence Minimum Case* one finds both the totality and the infinity story. This emphasizes how totality portrayals represent clearly only one, indeed valuable in various respects, side of the story told of the practice of the law of

[2043] BVerfGE 125, 175 (223)
[2044] BVerfGE 125, 175 (223)
[2045] BVerfGE 125, 175 (223)
[2046] BVerfGE 125, 175 (223)
[2047] BVerfGE 125, 175 (223); Wallerath (2008) 157, 160
[2048] BVerfGE 125, 175 (223)
[2049] BVerfGE 125, 175 (224)
[2050] BVerfGE 125, 175 (223f.)

human dignity. Notwithstanding their embodiment in the totality structure of a statutory provision, the results of inquiry into and development of the concrete content of the dignified subsistence minimum, noted the Court, should 'be reviewed and refined on an ongoing basis because a person's elementary requirement for life can in principle only be satisfied at the moment when it arises […].'[2051] The Court thus opened up an intersubjective space and, thereby, enabled the generation of pluralism. Impressively, in the *Subsistence Minimum Case* the pluralism associated with the intersubjective space is made possible in the practice of the law of human dignity in a context marked by the motif of sameness. Emphasis on sameness in producing the legal language game could have led the Court to disregard the particulars of lived experience.

The margin of appreciation of the legislature[2052] is narrower when it concretizes needs related to the physical existence of human beings and broader 'when it comes to the nature and scope of the possibility to participate in social life.'[2053] The difference in scope reflects and explains the manifestation of both the sameness and the otherness of human being-ness in the *Subsistence Minimum Case*. Apropos needs associated with physical existence, all human beings are in the main same; the narrower margin of appreciation suggests the limited possibility of the occurrence of dissensus, hence, in a sense, of real conversation in an intersubjective space. Inter-human relations and participation in social life evoke the otherness of human being-ness. While certain such needs could be in principle considered vital and, oversimplifiedly put, same for all, the concrete form they receive is contingent on the viewpoint of the other as an absolutely other. The process of concretely determining a social, cultural and political subsistence minimum in line with human dignity involves, to a considerable extent, dissensus within an intersubjective space, that is, alludes to 'something always missing' as the meta-dimension of practicing the law of human dignity, and 'something missing' as a *Leerstelle* concretely filled with meaning apropos *ad hoc* context.

iv. Two instances of face-to-face encounter

[2051] BVerfGE 125, 175 (225)
[2052] BVerfGE 125, 175 (223) ['This margin encompasses the evaluation of the actual circumstances, just like the valuing assessment of the necessary needs […].']
[2053] BVerfGE 125, 175 (223)

Two more instances of non-subsumption under the totality of the constitutional order beg separate discussion. The paradox they introduce is interwoven with the paradox of practicing human dignity language in law, namely the guarantee of infinity through totality structures. It has been established that infinity constitutes an aspect of the meaning of human being-ness and, consequently, of the law of human dignity. Listening and learning from experience is key to ensuring the correspondence between law and life and, particularly, to detecting real and actual cases of vulnerability. The Court drew attention to the lack of provision for special needs in the statute, and demanded that these needs be attended to through statutory law within the set time limit in view of their urgent nature and the state's commitment to *de facto* guaranteeing a subsistence minimum in line with human dignity that corresponds to reality.[2054] It, moreover, noticed the neglect of child-specific needs. Accepting that the amount of social benefits may diverge depending on who the other is, and stating, 'each member of a joint household – including children – has an individual right to this, and presumes a need that is absolutely necessary'[2055], the FCC emphasized:

> Their need […] must be orientated in line with child development phases and towards what is necessary for the development of a child's personality. The legislature omitted to carry out any investigation of this.[2056]

The FCC noted that the legislature failed to inquire into child-specific needs and deduced the 40% lower standard benefit for children freely, namely without grounding the amount in empirical findings and specified methods. The subsistence minimum in line with human dignity should be tailored to the needs of school-age children.[2057] From a hermeneutic and literary perspective, the portrayal of children ensuing from the text of the *Subsistence Minimum Case* can be viewed as the

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[2054] BVerfGE 125, 175 (259f.) ['The legislature is further obliged to create a provision in the Second Book of the Code of Social Law by 31 December 2010 at the latest ensuring that special needs according to the statements made at C. IV. are covered. Those eligible for benefits according to § 7 of the Second Book of the Code of Social Law with regard to whom such a special need exists must however also receive the necessary benefits in kind or money prior to the adoption of the new provisions. Otherwise, there would be a violation of Art. 1 sec. 1 GG, which may not be accepted even on a temporary basis. […] In order to avoid the risk of a violation of Art. 1 sec. 1 GG in conjunction with Art. 20 sec. 1 GG in the transitional period until the introduction of a corresponding hardship clause, the unconstitutional gap for the period from the promulgation of the judgment must be closed by a corresponding order from the Federal Constitutional Court.']
[2055] BVerfGE 125, 175 (232)
[2056] BVerfGE 125, 175 (246)
[2057] BVerfGE 125, 175 (246)

discernment of otherness within sameness, the breaking of the totality of the same. It testifies the endorsement of ongoing critical reflection as the humane practice of the law of human dignity. The child as the other is encountered face-to-face. The Court analyzed the significance of adapting the response to the other by means of statutory measures. The analysis conveys a hands-on approach to the needs of school children and the implications of customized social benefits for their future, as well as a pragmatic appreciation of the allocation of benefits in households.[2058]

4. Concluding observations

The ontological, linguistic-analytical and phenomenological portrayals propose another reading and understanding of the textual practice of the law of human dignity in the *Subsistence Minimum Case.* A few remarks are deemed necessary: similarly to imponderabilities in the *Aviation Security Act Case*, the atypical, identified with 'something missing', intimate the nature of circumstances in the world of lived experience. The unpredictable, the unforeseeable, what cannot be grasped or subject to our vision 'is there' as 'something missing' awaiting to be filled with content *ad hoc*. In the *Subsistence Minimum Case* the Court engaged in a face-to-face encounter with the other, namely two concrete instances of human being-ness and lived experience, in the recent subsistence minimum case before the FCC[2059] the aim has been to extend the subjective scope of the statutory law on the basis of sameness as regards the guarantee of one's livelihood, regardless of the status under which someone lives in Germany.

[2058] BVerfGE 125, 175 (246) ['An additional need is to be anticipated above all with school-age children. Necessary expenditure to comply with school obligations is part of their need in line with the subsistence minimum. Without covering these costs, children in need of assistance are threatened by being excluded from chances in life because they cannot successfully attend school without purchasing the necessary school material, such as school books, exercise books or calculators. The danger exists with school-age children whose parents draw benefits according to the Second Book of the Code of Social Law that their development will be compromised if they do not receive adequate state benefits, restricting their future capability to support themselves by their own efforts. This is not compatible with Art. 1 sec. 1 GG in conjunction with the principle of the social welfare state contained in Art. 20 sec. 1 GG.']

[2059] BVerfGE 132, 134 (2012) [*Asylbewerberleistungsgesetz*]

VI. ‘Something missing?’ A case-focused summary

This case-focused summary recapitulates the major points raised in the analysis of the texts of five seminal instances of practice of the law of human dignity in FCC jurisprudence, and puts forward the gist of derived insights into the meaning of the law of human dignity and the auxiliary pillars of the *Menschenbild* and the meta-dimension of law in this hermeneutic and literary exercise.

The hermeneutic and literary portrayal of the practice of the law of human dignity points to the demarcated realms of life and law. The distinction between the two spaces is evident in the *Abortion I Case,* where abortion is labeled a ‘phenomenon of social life’ and in the *Transsexual I Case*, where the Court stated that the constitutional question problematized belongs to the ‘innermost sphere of life’, distinguishing between the image of transsexuals at the level of law and their lived experience in life. The *Abortion I Case* and the *Transsexual I Case* are illustrative examples of inconsistency between the two realms. The portrayal of the relationship of the child *en ventre sa mere* to the mother and the nexus between the *Physis* and the *Psyche* within the realm of law is different than the portrayal within the realm of life. Sometimes these manifestations of human being-ness are even left unattended to within law. Similarly, in the *Aviation Security Act Case* imponderabilities marking the circumstances, that is, the realm of life, influence the appreciation of the situation, hence, consequently, also the practice of the law of human dignity by responsible actors. The identification of demarcating lines is presupposed by a figurative rendering of the traversal of limits or transcendence as transascendence, namely the processual understanding of human being-ness as. That the dignity of the human being is the highest value of the German constitutional order alludes to the notion of height and signals that the process of practicing the law of human dignity operates necessarily also on a vertical axis.

The mobilization of human dignity language in law precipitates practice of the dual sense of ‘something missing’. The abstractness and universality of the concept permit *ad hoc* concretizations, which can be perceived as the building of cases of verification. The infinity of concrete particular images of human being-ness, a taste of their richness being illustrated in examples brought forth by the dissenters in the *Abortion I Case,* presupposes ‘something always missing’, what can never be filled with content, the meta-dimension. The meta-dimension is also evinced in the practice

of the principle of proportionality in texts, regardless of whether such balancing is doctrinally relevant and significant. The principle of proportionality can be understood by analogy with the Wittgensteinian logical form or Levinas' intersubjective space. The order of values of the Basic Law is a concept on the borderline between totality and infinity. Reference to the moral law in the text of the cases under scrutiny alludes to the transcendental, ethics and aesthetics, in Wittgenstein's early work. Finally, morality in Levinas' thought and the absolute constitutional guarantee of inviolable human dignity paralleled to morality, are delivered to us as tautological propositions, namely possessing human dignity by virtue of being human. The tautology, a propositional limit, is breached in the texts analyzed *supra* by the *Objektformel.* In turn, the *Objektformel* is perceived in light of the ladder-metaphor as the trigger of critical reflection in view of reality, and the measure of the extent to which human dignity is guaranteed in actuality.

Surveyance of the subject matter and of the range of viewpoints within, and beyond, legal language games establishes the soundness of legal arguments. The breadth achieved through surveyance, the horizontal axis, enhances the depth of demonstrated understanding, the vertical axis. The humane practice of the law of human dignity requires that surveyance extends beyond the legal language game, law, to the content of the rest of the field of sight, life and that self-reflection of legal actors feeds on life to permit the evolution of the self as an *ipse* in relation to the other and the world. The self absorbs the alterity of the world, and the world changes in accordance with the good or bad willing of the self with authority over language and meaning. Contextual changes effectuate the disruption of identity. Self-reflection is key to practicing responsibility as the ability to respond to the other. Constitutional review and the principle of the separation of powers can be perceived as a self-reflection mechanism of the state. Through dissenting opinions, as in the *Abortion I Case*, the Court casts a self-reflective glance at the majority opinion, namely the collective voice with the critical authority over the meaning enforced. The linguistic-analytical layer of the introduced model allows for the portrayal of the majority opinion as a subtotal of the legal language game of the dissenting opinion.

In practicing the law of human dignity, the FCC as the speaking self and author of decisions produces the meaning of the law of human dignity and sketches the *Menschenbild*. Scrutinizing the cases through the lens of the introduced model focuses attention on both process and substance. As regards the former, the standard

for assessing compliance with processual requirements generated by the law of human dignity is responsibility as, elementally, the ability to respond to the other. At the same time, critical reflection on the ability to respond is called for to ensure cognizance and appreciation of the actuality, the 'face' of the other and the circumstances. The variety of images evoked in practicing the law of human dignity intimates the multifariousness of portrayals of the *Menschenbild* and verifies the aptness of telling a story of 'something missing', rather than insisting univocally on consensus or correspondence definitions. Provision for the multiplicity of concretizations of the *Menschenbild* surfaces, most paradigmatically, in the discussions of atypical needs and children's needs in the *Subsistence Minimum Case*. This is so, because this case concerns aspects of human being-ness with respect to which one would at first assume that all are same and, hence, portray a consistently empty *Menschenbild* and consider the tautology of the law of human dignity a representation of reality.

Potentiality and continuity are the critical qualities of unborn life as a concrete imprint on the *Menschenbild* in the *Abortion I Case*. On the other side of the weighing scale, the self-determination of the pregnant woman, at the same time the self and the other, also merits the protection guaranteed by the law of human dignity. State paternalism lurks in remarks on the legal consciousness of the pregnant woman and the general populace with respect to the value of human life. Considering penalization as an expression of legal condemnation the appropriate means to the shaping of legal consciousness suggests how the self perceives of the individual and the collective other. In the dissenting opinion, the circumstances and experience of the pregnant woman are extensively and vividly portrayed and her status as an absolutely other in line with the law of human dignity is reflected on to a greater degree. Comparably, in the *Aviation Security Act Case* the perpetrators of the crime are responded to both as the self who harms the other, namely the innocent on board the airplane, and, in an alternative portrayal, as the other, namely themselves bearers of human dignity and fundamental rights.

Thanks to the phenomenological insights deduced from Levinas' account of the pluralism of the intersubjective space, where absolute distances are observed and fraternity, solidarity, generosity, hospitality, freedom tempered by justice, equality, and morality set the terms of a relation instituted in language, and of the face-to-face encounter, self-determination can be understood anew. In the interplay between state

powers, entrusting the legislature with the treatment of particulars, namely specific issues framed as human dignity concerns, can be associated with the guarantee of self-determination on account of the democratic pedigree of statutory regulation. The law of human dignity, on the borderline between fact and law, proclaims that human dignity cannot be jeopardized; rather, the claim ensuing from the law demands state protection. Reflections on sacrifice in the *Abortion I Case* and the *Aviation Security Act Case* show that, in guaranteeing and fostering self-determination and assuming self-responsibility, the constitutional order does not go so far as to expect of the human being to assume and demonstrate a surplus of responsibility.

The human image sketched in the *Life Imprisonment Case* is an individual related to the community and bound by it, rather than an isolated and autocratic entity. In line with the social dimension of human being-nesss, the law of human dignity is interpreted in that case as the guarantee of the hope to return to the society of free citizens. In the *Aviation Security Act Case* the FCC is occupied with the more basal distinction between the human image and an object. Under the circumstances of deadlock experienced by innocent individuals on board a hijacked airplane, objectification evokes a portrayal on the borderline between the literal and the non-literal. In portrayals of the absolutely other the Court employs the figure of spheres of responsibility. The dissenters in the *Abortion I Case* depicted absolute separation by stressing that the life of the unborn child falls within the sphere of responsibility of the pregnant woman. Similarly, in the *Aviation Security Act Case* the FCC delineated spheres of responsibility to deal with the imponderabilities rendering the situation ungraspable by legal actors in the decision-making system and to afford each human being involved in the case the respect and protection of human dignity corresponding to its self-determination and self-responsibility.

The negative delineation of the *Menschenbild* in the *Transsexual I Case* indicates how the Court seeks to understand who the human being is where this understanding has not been established and could be loaded with bias as to its compatibility with the moral law. Recourse to the authority of viewpoints other than that of the speaking self, namely engagement in external justification and cognizance of the viewpoint of the metaphysical subject in concretizing the *Menschenbild*, are instantiations of the processual understanding of responding to the other. Pragmatism, not just humanism, is a crucial parameter of responsibly answering to the other. The self has to demonstrate the ability to address pragmatic considerations so as to

respond in actuality to the other as in the *Abortion I Case* and the *Subsistence Minimum Case*. In line with this requirement, noted the Court in the *Life Imprisonment Case*, law is not to be practiced 'for its own sake'. The statement denotes not only something higher than criminal law within the constitutional order and beyond it, but also points to the human being as the ultimate end of the humane practice of law; as Levinas assures us both are one, the Other is encountered in the face of the other. The sociological insights brought forth in the *Abortion I Case* are an example of how a paternalistic stance can be adopted on the pretext of humanism.

Paternalism can be rendered in view of the proposed hermeneutic and literary model as the guarantee of the inviolability of the limit, in other words the position of the metaphysical subject vis-à-vis its world, rather than the guarantee of the inviolability of the metaphysical subject *per se*, as a concrete and unique face, the face of the absolutely other. In other words, if the state lingers on guaranteeing that human beings are positioned at the limit, adopting the stance of a totalizer self, and forgets the infinity of the face, namely the absolutely other human being at the limit, the state as self might become unbendable and stringent, forcing a certain ethical positioning of human beings as legal subjects, rather than permitting them their own viewpoint on the world as a field of meaning.

The humane practice of the law of human dignity amounts to a guarantee of protection against forced and forceful interference with the self-determined unfolding of human being-ness. Whereas this unfolding requires the *polemos*, unconcealment of the *φύσις* of human beings is not to be externally forced; *a minore ad maius* the law of human dignity forbids forceful attacks causing the *ex negativo* manifestation of human being-ness. The forced and the forceful are not always as clearly distinguishable as in the *Life Imprisonment Case*; drawing a line between the two modes of interference, in most cases a question of intensity, rests on whose perspective determines the 'how' of the protection called for in response to a violation that generated the *ad hoc* practice of the law of human dignity. The disparity between the majority and the dissenting opinion as regards what counts as forced and forceful in the *Abortion I Case* are illustrative of the definitional difficulty.

Applying the hermeneutic and literary model and concepts deduced from the philosophical grounds drawn upon to the text of the cases under scrutiny affords the analysis language for portraying aspects of the practice of the law of human dignity. Compatibility or incompatibility with the constitution can be depicted respectively as

subsumption or non-subsumption under the totality of the legal language game emanating from the eye of the constitutional judge looking through the lens of the Basic Law. As the linguistic-analytical reading of the text of the *Abortion I Case* indicates, the judge can resort to lenses other than law, that is, extra-legal sources or the moral law, and other than the Basic Law, namely other fields of law. The boundaries of the legal language game fluctuate when the Court engages in negative delineation of the human image or a particular subject matter as in the *Transsexual I Case*, in juxtaposition as in the *Life Imprisonment Case,* where the Court discussed life imprisonment sentencing vis-à-vis death penalty, and in external justification. The law of human dignity as the critical lens operates as a mediating term. Mediation can be perfunctorily understood in light of equation in Wittgenstein's *Tractatus Logico-Philosophicus*; the imperative that mediation should not destroy the radical distance between the self and the other found in Levinas' *Totality and Infinity* sets restrictions on the employment of the law of human dignity as a mediating term, for instance in the *Life Imprisonment Case* and in the *Abortion I Case.*

CONCLUSIONS

'Something missing' is premised on a three-pronged philosophically grounded hermeneutic and literary account of human dignity that is sparked by the empirical observation of ambiguity and controversy in portrayals of the practice of the law of human dignity. The three accounts are conceivable responses to the question 'How is the concept empty?' In framing the practice of the law of human dignity apropos the dual sense of 'something missing' rather than what is there, namely the range of theoretical and empirical particulars defining its meaning, we abstract ourselves from the projects of adequation, verification and falsification of theoretical accounts and legal arguments encountered in practicing that law, as well as discord and *circulus in probando* argumentative schemata in the broader discourse, and reveal the nexus between 'something always missing', the meta-dimension of law, and 'something missing', identified within what is there, our world. The dual sense of 'something missing' furthers an affirmative stance towards what escapes our grasp and stresses that 'something missing' within legal language games comprising human dignity language must be filled by recourse to context and through critical reflection and self-reflection. The introduced model portrays the practice of human dignity and permits emphasis on the human factor within legal language games.

The analysis can sensitize legal actors practicing the law of human dignity to the language they employ and, consequently, the meaning they produce. The present inquiry aims only to advance ontological, linguistic-analytical and phenomenological accounts of the law of human dignity and to apply them in portray the practice of that law in the text of seminal instances of FCC jurisprudence, all established in cross-Atlantic legal discourse as prevalent human dignity case law. In view of the distinct emphasis on the human factor wherever it can be traced in the portrayal of practice, this project is of pertinence to legal sociology and cultural studies. The thesis and the arguments composing it can offer impetus for further research in other disciplinary directions.

Research on the law of human dignity commenced in September 2009. Since then the European crisis has brought to the forefront of concern the relation between institutions and human beings. Who really serves whom? This thesis demonstrates how human dignity can be perceived, in light of the dual sense of 'something

missing', as a Trojan Horse within the walls of the institution of law. I propose revisiting this relation by understanding lawmaking as the building of totalities that foster – among many things – infinity. The new understanding introduced in this thesis is that the guarantee of human dignity in law constitutes an *a priori* commitment to an affirmative stance on the breach of totality. Human beings escape totalities, transcending towards infinity, so that they be human, and so that they portray the world and question its boundaries, limits and meaning. At the same time they fill their world, the plane extending in front of their eyes, with meaning. In doing so, they act as metaphysical subjects at the limit of their world, namely the place identified with the transcendental, ethics and aesthetics in the *Tractatus Logico-Philosophicus*.

> […] [T]he world must thereby [by good and bad willing] become quite another. It must so to speak wax or wane as a whole. The world of the happy is quite another than that of the unhappy.[2060]

The law of human dignity guarantees the possibility to continually rename the world. The human dignity story of 'something missing' is an affirmative stance towards guaranteeing empty space within legal language games in order for new language originating infinitely in the practice of the law of human dignity to come-into-being within the realm of law.

[2060] Wittgenstein, *Tractatus,* (6.43)

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